IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE	)	
CARE AND TREATMENT OF	)	No. SC 85304
ANGELA COFFEL,	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF LINCOLN COUNTY, MISSOURI
FORTY-FIFTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE PATRICK FLYNN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Angela Coffel appeals the judgment and order of the Honorable Patrick Flynn following a bench trial committing Ms. Coffel to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. Initial jurisdiction of this appeal was in the Missouri Court of Appeals, Eastern District, Article V, Section 3, Missouri Constitution (as amended 1982), Section 477.050, RSMO 2000; but this Court accepted the case on the State's application for transfer after the Eastern District reversed Ms. Coffel's commitment because the evidence is insufficient to prove beyond a reasonable doubt that Ms. Coffel has a mental abnormality rendering her more likely than not to engage in predatory acts of sexual violence. Article V, Section 10, Missouri Constitution.

STATEMENT OF FACTS

According to the reports of a Lincoln County deputy, thirteen year old Matt, and his eleven year old brother Jeffery, had gone to a neighbor's house where Angela Coffel was babysitting and cleaning (Tr. 33- 34, 37, 39, 40).[1] The boys had gone there because they helped Ms. Coffel clean the house (Tr. 37). They saw Ms. Coffel take her clothes off in the bathroom and take a shower (Tr. 37, 39). Ms. Coffel and the boys played Truth or Dare, and Ms. Coffel's dare was to suck the boys' privates (Tr. 36-37, 37-38, 40). The homeowner saw the incident, told the boys' mother, and the incident was reported to the police two days later (Tr. 42). Ms. Coffel was seventeen or eighteen years old when she pleaded guilty on March 4, 1996, to two counts of sodomy (L.F. 7, Tr. 139-140).

Ms. Coffel was scheduled for release from prison on July 31, 2000 (L.F. 7). A Department of Corrections employee prepared an end of confinement report for Ms. Coffel on April 5, 2000 (L.F. 12). The report suggested that Ms. Coffel suffered three statutory mental abnormalities (L.F. 19). The DOC employee concluded that the first abnormality, antisocial personality disorder, appeared to cause Ms. Coffel "difficulty conforming to social norms with respect to lawful behavior." (L.F. 19). The employee believed that Ms. Coffel had a second

abnormality, sexual sadism, because she was HIV positive and was "willing to risk infecting others with a deadly disease by having unprotected sexual contact with them." (L.F. 17, 19). Ms. Coffel reported contracting HIV around age fifteen or sixteen (L.F. 17). According to the DOC employee, Ms. Coffel's third abnormality, alcohol abuse, "affects her judgment regarding her behavior." (L.F. 19). The DOC employee suggested that Ms. Coffel may meet the definition of a sexually violent predator (L.F. 19).

The Multidisciplinary Team assembled by the Department of Mental Health concluded that Ms. Coffel did not appear to meet the statutory definition of a sexually violent predator (L.F. 65). But the Prosecutors Review Committee voted unanimously that Ms. Coffel may meet the definition of a sexually violent predator (L.F. 9). The Prosecutors Review Committee is assembled by the Prosecutors Coordinators Training Council, a group composed of the president, vice-president, secretary, treasurer, and immediate past-president of the Missouri Prosecuting Attorneys Association, and the attorney general of the State of Missouri or his designee. Section 56.760, RSMo 2000. The vote of the Prosecutors Review Committee authorized the State to file a petition pursuant to Section 632.480, RSMo Cum. Supp. 1999, *et seq.*, seeking Ms. Coffel's confinement

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[1] The record on appeal consists of a legal file (L.F.) and trial transcript (Tr.).

in a secure Department of Mental Health facility as a sexually violent predator, which it did on June 22, 2000 (L.F. 6-8).

On August 25, 2000, the probate court found probable cause to believe that Ms. Coffel might be a sexually violent predator, ordered her confined, and ordered an evaluation by the Department of Mental Health (L.F. 29-31). Dr. Richard Scott concluded in his October 30, 2000, report that Ms. Coffel's antisocial personality disorder was not a mental abnormality under the statute because there was no relationship between the disorder and the sexual offenses that led to her incarceration (L.F. 74). Dr. Scott opined that Ms. Coffel was not more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility (L.F. 74). The doctor further noted that the conclusion of the DOC employee that Ms. Coffel was a sexual sadist was not supported by any reference to the DSM-IV-TR, nor was there a "basis in any records for that diagnosis." (L.F. 73-74).

The State's petition was tried to the probate court on July 19, 2001 (Tr. 6). The State's first witness, Philip Contanzaro, met Ms. Coffel in 1994 or 1995, when he was twenty years old and she was seventeen or eighteen years old (Tr. 13-14, 17). He said that he and Ms. Coffel engaged in vaginal sex the first night they met, and two days later engaged in fellatio (Tr. 15, 16-17). These acts were

consensual (Tr. 21). Mr. Contanzaro testified that Ms. Coffel initiated the sexual acts (Tr. 15, 16-17). He said that they used "protection," although there had been no indication that it was a necessary precaution against pregnancy or a disease (Tr. 16). Mr. Contanzaro asked Ms. Coffel several days later if she had HIV, and he testified that Ms. Coffel told him that she did not have that disease (Tr. 19). Ms. Coffel's mother later showed Mr. Contanzaro some "paperwork" which indicated that Ms. Coffel was HIV positive (Tr. 19). Mr. Contanzaro did not contract that disease (Tr. 21).

Kent Travis testified that he wrote Ms. Coffel a conduct violation in Renz Correctional Center on October 15, 1996 (Tr. 53-55). He said that he was standing behind a desk directing inmates during a move to another housing unit when Ms. Coffel walked up and pressed herself, her breasts and stomach, against him (Tr. 55). Ms. Coffel stepped away the second time he told her to (Tr. 57-58). Mr. Travis wrote a conduct violation for sexual misconduct, but Ms. Coffel was disciplined for disobeying an order (Tr. 54, 59-61).

Daniel Esparza testified that he wrote Ms. Coffel a conduct violation in Renz in August of 1997 (Tr. 63-65). Ms. Coffel was restricted to her cubicle, but Mr. Esparza found her in another inmate's cubicle at 12:55 a.m. (Tr. 64-65). He

wrote violations for disobeying an order, being out of cubicle, and being out of bounds (Tr. 64-65).

Brian Buckley, another correctional officer at Renz, recalled at trial that Ms. Coffel received another conduct violation in August of 1997 for being out of her cubicle at 12:15 a.m. (Tr. 22, 29-30). Mr. Buckley wrote a conduct violation for Ms. Coffel on November 10, 1997 (Tr. 24). He was moving her from one cell to another in the administrative segregation unit, and Ms. Coffel refused to zip up her prison jumpsuit which was exposing her breasts (Tr. 27). Other men in the area were yelling at the sight (Tr. 27).

Mr. Esparza testified that he wrote a sexual misconduct violation against Ms. Coffel in April of 2000 (Tr. 67-68). He had observed Ms. Coffel put her arm around another inmate and kiss her on the mouth while the women were in the recreation room (Tr. 67-68). The kiss appeared consensual and the other inmate also received a violation (Tr. 69-70).

Ms. Coffel raised an objection to the State's witness Patricia Davin expressing a diagnosis of Ms. Coffel's mental state or making a risk assessment because Ms. Davin is not a licensed psychologist or psychiatrist (Tr. 71, 131-132). The probate court inquired of the State its purpose for Ms. Davin's testimony (Tr. 71). The State replied, "To give expert opinion on the characteristics of female

sex offenders and those characteristics that she has discovered through her research that exists in the female sex offender, and what makes them different than male sex offenders and male sexual predators." (Tr. 71-72). The State went further and suggested that Ms. Davin had reviewed the materials regarding Ms. Coffel and had opinions whether or not there were risk factors that exist that make Ms. Coffel more likely to reoffend (Tr. 72). The State suggested that Ms. Davin had the experience to say what those risk factors are (Tr. 72).[2] The probate court noted that it had excluded Ms. Davin's testimony at prior hearings because she was not a licensed psychologist as required by Missouri statute, but permitted her testimony at trial to provide information involving female sex offenders, a novel issue (Tr. 72).

Ms. Davin is a marriage and family therapist in Carson City, Nevada (Tr. 74-75). She wrote her doctoral thesis, completed in 1992, on female sex offenders (Tr. 79-80, 134). She has done no research on female sex offenders since (Tr. 134). Ms. Davin found that there were very few studies of female sex offenders, and those that had been done involved small samples of offenders (Tr. 80). Ms. Davin studied a group of sixty-seven female sex offenders (Tr. 83-84). Her study

[2] Ms. Davin, however, testified: "I'm not aware of a body or research specific to female sex offenders with risk of reoffense." (Tr. 118).

was not intended to identify risk of reoffense by women, but rather only to identify the characteristics of female sex offenders (Tr. 137-138).

Ms. Davin's research found the primary difference between male and female sex offenders was the motivation for the offense (Tr. 86). Men are motivated in a sexual way, and use sex to gain power or independence (Tr. 86). Women are motivated toward a connection or intimacy with another person, and use sex to achieve that (Tr. 86). Men are more aggressive, women more emotionally coercive and may use game playing (Tr. 87).

Ms. Davin indicated that there are two basic types of female sex offenders: co-offenders who act with another, usually a male offender; and independent offenders who act alone (Tr. 88-89). The most common type is the co-offender (Tr. 89). Ms. Coffel was an independent offender (Tr. 93). Ms. Davin described the general characteristics of independent female offenders (Tr. 96). They are:

- Caucasian (Tr. 96).
- Younger age (Tr. 96).
- Older than their victims by five years (Tr. 96).
- From troubled homes (Tr. 96).
- Psychologically or physically abused, primarily by their mothers, beginning before age ten (Tr. 96).

- Problems with authority and defiance of rules (Tr. 97).
- Superficial relationships (Tr. 99).
- Psychological disturbance (Tr. 100).
- Over-sensitivity to rejection (Tr. 101).
- Lack of sense of boundaries (Tr. 101).
- Identity problems (Tr. 102)
- Lack of ego strength (Tr. 102).
- Inability to form age appropriate relationships (Tr. 102).
- Self-critical (Tr. 103).
- Strong need for acceptance or connection (Tr. 103).
- Failure to see their conduct as a problem (Tr. 108).
- Lack of empathy or remorse (Tr. 108).
- Lack of paraphilias (Tr. 115, 116-117).
- Offended against persons under eighteen (Tr. 122).

Ms. Davin's research did not include any non-sex offenders so she did not know if these characteristics were particular to sex offenders (Tr. 135).

Ms. Davin also described typical patterns of offending among female sex offenders:

- Most victims are acquaintances (Tr. 109).

- Victim selection is more opportunistic than planned (Tr. 109).
- They do not stalk their victims (Tr. 109-110).
- Incidents usually happen in the home (Tr. 110).
- The incidents are more seductive than aggressive, including the use of games to gain cooperation (Tr. 110).
- Fondling and oral sex is most common (Tr. 111).

Ms. Davin identified many of the characteristics of a female sex offender in Ms. Coffel. Ms. Coffel had demonstrated problems with authority and defiance of rules (Tr. 97). Ms. Coffel was emotionally regressed; she acted in a manner younger than her actual age, and continued to exhibit that regression (Tr. 100). Ms. Davin noted that there appeared to be a lack of boundaries in Ms. Coffel's home in the form of open sexual contact by family members (Tr. 101). Ms. Coffel demonstrated a lack of clear sexual identity, vacillating between hetero- and homosexuality (Tr. 102). Ms. Davin found a strong need for acceptance in Ms. Coffel's gang affiliation as a teenager and her use of sex to gain friends or emotional fulfillment (Tr. 103-108).

Ms. Davin's purpose in her research was to identify characteristics of female sex offenders, not risk factors for sexual reoffense (Tr. 137, 138). She did not know if any of the women in her study had reoffended (Tr. 137-138). Ms.

Davin admitted, "…we have no way of knowing or no idea whether those characteristics have anything to do with whether a person will sexually violently reoffend." (Tr. 138). She noted that "[o]ther than identifying Angela as an independent offender, there's no application – no other application of [her] particular study to be done for Angela." (Tr. 138).

The State asked Ms. Davin: "Is there an existing substantial body of research on female sex offenders that is available to answer the question whether or not Ms. Coffel is more likely than not to reoffend?" (Tr. 117-118). Ms. Davin replied, "I'm not aware of a body of research specific to female sex offenders with risk of reoffense." (Tr. 118). The State then asked: "Based on your research and your view of the literature, are there factors that you believe can assist either a mental health profession or a trier of fact whether or not someone is more or less likely to reoffend in the future?" (Tr. 118). Ms. Davin believed so (Tr. 118). She expressed the opinion that Ms. Coffel was likely to reoffend because:

> I have not seen treatment of meritorious treatment. There still appears to be confusion with respect to identify [sic] including sexual identity. I have not seen evidence in the records of remorse or empathy. She still uses relationships with people she knows nothing about, has pursued relationships with under age.

(Tr. 123-124). On this last issue, Ms. Davin noted that Ms. Coffel had sexual relations with a fifteen year old named Timothy Ahrens while she was awaiting sentencing for the index offenses (Tr. 124). Ms. Davin took from this that Ms. Coffel had no regard for other persons, the law, or norms of society (Tr. 124).

The State then asked Ms. Davin to accept that it was not seeking, and had no right to seek Ms. Coffel's commitment because she was HIV positive, but asked, "… nevertheless … is the fact that she is HIV-positive and engaged in unprotected sex with Timothy Ahrens when he is fifteen years old and when she knew she was HIV-positive, does that have any impact on your concern over whether or not she is a risk to reoffend?" Ms. Davin replied "it concerns me" because it appeared that Ms. Coffel had no concern for the other person but continued to be consumed by what she needs and what she wants (Tr. 125).

Ms. Davin indicated that she was also "concerned" that Ms. Coffel continued to act out sexually in prison and mental health facilities (Tr. 125). The doctor believed that suggested that Ms. Coffel did not learn from punishment and was willing to pursue what she wants despite the consequences (Tr. 125). She was also "concerned" that Ms. Coffel had asked for birth control upon release from prison, indicating that she intended to remain sexually active (Tr. 130).

Ms. Davin was aware that Ms. Coffel had been diagnosed with borderline personality disorder, and she agreed with that diagnosis (Tr. 128). The doctor noted that Ms. Coffel appeared to display the same characteristics found in a psychological evaluation performed when Ms. Coffel was nine years old, except that those characteristics "may not be identical because of age differences…." (Tr. 126). Ms. Davin was "concerned" that because Ms. Coffel has antisocial personality disorder[3] "she is likely to reoffend sexually in violation of the sexual predator statute," because there is a correlation between antisocial personality disorder "and criminality in general." (Tr. 129). Ms. Davin was therefore "concerned" that Ms. Coffel will reoffend in the same manner she offended before (Tr. 129-130).

The State retained Dr. Amy Phenix, a California licensed psychologist with a wholly forensic practice, primarily in sexually violent predator cases (L.F. 116, Tr. 324-325, 327). Dr. Phenix has diagnosed or treated female offenders, but never a female sex offender prior to Ms. Coffel (Tr. 328, 338). She began her

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[3]Ms. Davin agreed with the diagnosis of *borderline* personality disorder, but followed along when the State questioned her about *antisocial* personality disorder.

training with the 1995 landmark study of male sex offenders by Dr. Carl Hansen which developed recognized risk factors for reoffense and the actuarials which are employed to assess male offender recidivism (Tr. 331). Dr. Phenix has continued her training since then, but not necessarily regarding female sex offenders because research in that area is "very scant" (Tr. 332). She testified that there are two issues in an SVP case. The first is to "diagnose a mental disorder that would actually predispose someone to do a very specific type of offense, and that would be a sexual offense." (Tr. 333). The second issue is to assess risk to "provide as accurate as possible prediction about who is more likely than not to go on to continue to exhibit deviant sexuality versus those who may not." (Tr. 334). Dr. Phenix typically uses the most appropriate actuarial instrument available to determine a reasonable "ball park" probability of reoffense (Tr. 334). She said that since no actuarial contains all of the known risk factors, other factors are weighed to reach a clinical assessment of risk (Tr. 334-335). Dr. Phenix said that all SVP evaluations have an element of clinical judgment (Tr. 335).

Dr. Phenix acknowledged that she is well known for advocating the use of actuarials in assessing recidivism risk in male sex offenders, and she is the author of the Static-99 coding manual (Tr. 389). She favors the use of actuarials because

studies have shown that the evaluator's ability and accuracy are improved by their use (Tr. 389-390). Dr. Phenix acknowledged that there was no actuarial instrument for use in risk assessment of female sex offenders (Tr. 389). Thus, all of the risk factors she considered in Ms. Coffel's case were based on clinical judgment (Tr. 389). Dr. Phenix also acknowledged that there is no "determined list of risk factors for a large analytical study" of female sex offenders (Tr. 389).

Dr. Phenix diagnosed Ms. Coffel with three mental conditions: alcohol dependence, antisocial personality disorder, and borderline personality disorder (Tr. 339, 341, 342, 355). She testified that none of these conditions predisposes Ms. Coffel to commit sexually violent offenses, but they all work together (Tr. 361). Dr. Phenix said that the alcohol dependence makes everything worse because it decreases a person's ability to make reasonable choices (Tr. 362).

Dr. Phenix described antisocial personality disorder (APD) as a long-term, pervasive condition beginning in adolescence (Tr. 350). It is usually marked by disruptive behavior or law-breaking (Tr. 350). Lying, deceit, and impulsivity are personality factors associated with APD (Tr. 350-351). Dr. Phenix testified that Ms. Coffel demonstrated the characteristics of APD prior to age fifteen by running away, aggressive or violent behavior, and lack of compliance with rules (Tr. 351). The doctor found characteristics of APD in Ms. Coffel's gang

membership as a teenager (Tr. 351-352). Dr. Phenix testified that the index offenses demonstrated extremely impulsive behavior typical of persons with APD (Tr. 352). She also concluded that by ignoring her HIV, Ms. Coffel was demonstrating a lack of regard for herself and others (Tr. 352). Dr. Phenix said that Ms. Coffel continued to demonstrate antisocial behavior, "while not in that form," by her lack of compliance with DOC and DMH regulations (Tr. 352-354). The doctor noted that when Ms. Coffel is confronted she gets mad and curses, consistent with APD (Tr. 354-355).

Dr. Phenix testified that the APD predisposed Ms. Coffel to sexually violent offenses because it caused a lack of empathy, a disregard for social norms, and allowed her to violate rules (Tr. 361). The doctor said that the disorder affected Ms. Coffel's volitional capacity because she was running "amok" sexually with no apparent need to control herself (Tr. 362). Dr. Phenix believed that Ms. Coffel's increased interest in sex coupled with a disregard for other people "sets the stage and allows for … the kind of deviant sexual behavior we saw committed in the offenses." (Tr. 362).

Dr. Phenix testified that the characteristics of borderline personality disorder (BPD) include serious disruption of interpersonal relationships, emptiness, a void in self-identity, serious impulsivity such as promiscuity,

impulsivity in reaction to fear of abandonment or interpersonal conflict, immaturity, and a desperate need for closeness (Tr. 355). She said that Ms. Coffel has "classic" BPD (Tr. 356). Dr. Phenix noted that Ms. Coffel had been promiscuous from a very young age (Tr. 357). She believed Ms. Coffel uses sex as a way of coping and filling a void in her life (Tr. 357). The doctor also found an element of impulsivity, a lack of volitional control, in the index offenses (Tr. 360).

Dr. Phenix answered the State that she found other factors that she believed made Ms. Coffel more likely than not to engage in predatory acts of sexual violence (Tr. 363). One factor was what the doctor described as hyper-sexuality which was linked to abnormal over-stimulation caused by her mother's promiscuity when Ms. Coffel was very young (Tr. 363-364). Dr. Phenix said that the virility of Ms. Coffel's sexuality was "troubling" (Tr. 365). She noted that Ms. Coffel had sex with men before she went to prison and then with women after she went to prison (Tr. 365). She believed that Ms. Coffel had no defined sexual preference, thereby enlarging the "victim pool" (Tr. 365). Dr. Phenix thought that he ages of the boys was important (Tr. 366). Even though the index offenses involved only one incident, Dr. Phenix thought it established a deviant interest (Tr. 367). And while she acknowledged that it would not be unusual for an

eighteen year old boy to have sex with a fifteen year old girl, Dr. Phenix thought it was "noteworthy" that at eighteen Ms. Coffel had sex with a fifteen year old boy (Tr. 366). She suggested that it showed poor judgment and risky behavior (Tr. 368-369).

Dr. Phenix believed that in terms of risk, it was significant that Ms. Coffel had not completed sex offender treatment (Tr. 369). She believed that Ms. Coffel needed an understanding of the gravity of her situation and to learn the skills to prevent "this" in the future (Tr. 369). The doctor suggested that there was no indication that Ms. Coffel knew or appreciated how serious this was (Tr. 370). She further believed that because Ms. Coffel had been disruptive in sex offender treatment she would refuse to go to treatment in the community (Tr. 370).

Dr. Phenix thought Ms. Coffel's risk of reoffense was increased by Ms. Coffel's intention to live in her parents' home until she could find a place of her own (Tr. 370-371). The doctor felt that Ms. Coffel described her parents in ways that are typical of borderline personality disorder (Tr. 370-371). Since a symptom of BPD is a lack of interpersonal skills, Dr. Phenix concluded that Ms. Coffel's parents would therefore be unable to help Ms. Coffel (Tr. 372).

Dr. Phenix believed another factor increasing Ms. Coffel's risk to reoffend was found in Ms. Coffel's desire to have a baby sometime in the future (Tr. 373).

The doctor considered this unrealistic, but she did not explain why (Tr. 373). She interpreted the desire simply to be a form of attention seeking, and would cause Ms. Coffel to use sex to get that attention (Tr. 373).

Dr. Phenix believed that Ms. Coffel's age, twenty-four, and immaturity increased her risk to reoffend (Tr. 374). The doctor expressed the "hope" that as Ms. Coffel got older she could, with help, develop the physical skills to appropriately channel her sexuality (Tr. 372).

Dr. Phenix also expressed "considerable concern" over Ms. Coffel's negative moods (Tr. 375). She was concerned that Ms. Coffel would use sex to feel better (Tr. 375).

Based on these factors, Dr. Phenix reached the clinical judgment that Ms. Coffel is more likely than not to engage in predatory acts of sexual violence if not confined in a secure treatment facility (Tr. 376).

Dr. Phenix admitted that the problem with clinical judgment in risk assessment is that clinicians over-estimate the risk of reoffense (Tr. 390). Studies with male offenders demonstrate that clinical judgment is no more accurate than chance (Tr. 390). It was because of the inaccuracy and over-estimation of risk in clinical judgments that the actuarials for male offender recidivism were created.

Dr. Phenix admitted, "So I think it is premature to make a judgment of how accurate we are with females." (Tr. 390).

Dr. Phenix answered the State in re-direct examination that she "cannot wait" for empirical research on the recidivism of women (Tr. 391). She said that because of the "scant research identifying these risk factors" for women "we must rely on whatever experience we have and realize the limitation and drawbacks in predictions which I fully acknowledge." (Tr. 391).

Dr. Kathleen Colebank is the treatment supervisor of the Kentucky sex offender treatment program, which includes female sex offenders (Tr. 195). Dr. Colebank began a study with another doctor in 2000 to examine recidivism and risk factors for recidivism in female sex offenders (Tr. 196, 199). Their research was based on 97 women, going back to 1982 (Tr. 199, 206). While not a large group, that was the largest number of female sex offenders ever studied (Tr. 206). The results of the study were to be presented at a conference for the Association for the Treatment of Sexual Abusers in November of 2001 (Tr. 196).

Prior to her study, Dr. Colebank found no studies on recidivism by female sex offenders, only studies relating to the typologies of female offenders (Tr. 197-198). Dr. Colebank testified that it is unknown whether the typology relates to risk of reoffense (Tr. 198). She also testified that even with the group she studied,

the doctors could not identify the variables which relate to risk for reoffense (Tr. 198). Of the 97 women in the study, none committed a new sex offense (Tr. 207). Twenty-four percent of the women committed a new, non-sex related offense after an average of seventy-three months on probation or parole (Tr. 210). Dr. Colebank told the court that "[i]n terms of female sex offenders and understanding the risk factors and recidivism with females, we're probably in the same place we were maybe twenty or twenty-five years ago with male sex offenders." (Tr. 196). The doctor also testified that research on male sex offenders could not be applied to female sex offenders because of the different motivations for offending between men and women (Tr. 215). Dr. Colebank testified that there was no way to empirically determine the risk factors for female sex offenders; "There's only clinical judgment or guessing." (Tr. 214).

Dr. Delany Dean, a Missouri licensed psychologist, testified that Ms. Coffel did not have a mental abnormality predisposing her to commit predatory acts of sexual violence, nor did she meet the definition of a sexually violent predator (Tr. 234, 260-261, 262). Dr. Dean determined that Ms. Coffel's risk of reoffending was very low using the Personality Assessment Inventory (Tr. 239). This is an empirical test (Tr. 239).

The first scale of the PAI that Dr. Dean thought could be relevant to risk of reoffense was the antisocial scale (Tr. 250). This is an important factor in general recidivism (Tr. 250). The most severe antisocial personality disorder is psychopathy, and Ms. Coffel is not a psychopath (Tr. 250). Ms. Coffel did show characteristics of both antisocial personality disorder and borderline personality disorder (Tr. 250, 255). A diagnosis of APD is broken down into three factors: egocentricity, stimulus seeking, and antisocial behavior (Tr. 252). Antisocial behavior is taken as a given for anyone convicted of a crime (Tr. 252). So the other two factors are important to determine whether the convicted person has APD (Tr. 252). These two factors are personality factors that render a person amenable to repeatedly violating the rights of others (Tr. 252).

Ms. Coffel's egocentricity score was at the bottom of the scale, meaning that her criminal behavior was not the result of her being self-centered (Tr. 252). Egocentrism or narcissism are not a core elements of Ms. Coffel's personality (Tr. 253). Neither is stimulus seeking (Tr. 253). Ms. Coffel's score on this scale was in the middle of the scale (Tr. 253). Dr. Dean concluded that Ms. Coffel's gang membership was for companionship, not thrill-seeking (Tr. 253). The doctor concluded that Ms. Coffel is not driven by the types of internal motivators that cause people to consistently violate the rights of others (Tr. 253).

Two other factors reviewed by Dr. Dean were the warmth and dominance scales (Tr. 253). These scales distinguish between two types of persons, those who want to dominate others, and those who want to get close to others (Tr. 254). Predators are high on dominance, low on warmth (Tr. 254). Ms. Coffel's warmth scale was higher than her dominance scale, and both were in the middle ranges of the scales (Tr. 254). Dr. Dean explained that the scores mean that Ms. Coffel does not try to get over on others; she tries to be close to them (Tr. 255). These features suggest that Ms. Coffel may make poor choices and get into problematic relationships, but mostly where she will be dominated or hurt (Tr. 255). Dr. Dean testified that Ms. Coffel showed no signs of a person who would take advantage of another for her own purposes, sexual or otherwise (Tr. 255).

Dr. Dean described Ms. Coffel as "simply a young woman who's relatively immature for her age but is much better than she was some time ago." (Tr. 258). She concluded that Ms. Coffel was "better" now by observing Ms. Coffel's conduct and reviewing the conduct violation reports from DOC and DMH (Tr. 258). Dr. Dean noted that Ms. Coffel had be able to form some good relationships with staff, and "has shown a capacity to mature and learn how to handle human relationships in an adult fashion." (Tr. 258). Ms. Coffel had to "grow up" once in prison and hospital settings (Tr. 258). Her emotional

outbursts were described as common with BPD (Tr. 259). They are also common with adolescence, which is why Dr. Dean will not normally diagnose someone under age twenty-five with BPD (Tr. 259).

Dr. Dean told the State that she found no evidence of a paraphelia (Tr. 275). Ms. Coffel does not display a manner of impulsively engaging in sexual behavior with children (Tr. 270). Dr. Dean testified that Ms. Coffel was a very childish adolescent when she committed the offenses, and the doctor viewed them as simply sex play between children (Tr. 259). She was aware of the contact with Ahrens, but noted that at the time Ms. Coffel was only two or three years older than Ahrens (Tr. 300). Dr. Dean believed that Ms. Coffel has no interest in children whatsoever (Tr. 300).

Dr. Dean acknowledged that she considers the presence of APD because it has some effect to cause a person to act out sexually (Tr. 272). But that is demonstrated mostly among male rapists (Tr. 272). In and of itself, APD does not cause a person to commit sex offenses (Tr. 273). There must be some sexual issue to be exacerbated by the APD (Tr. 273). The vast majority of persons with APD are not sex offenders, and there must be something more for Dr. Dean to testify that APD renders a person more likely than not to commit a sexual offense (Tr. 273).

The State cross-examined Dr. Dean on the "risk" posed to other persons from the HIV virus (Tr. 308-315). It asked Dr. Dean about the "risk" of transmission of that disease (Tr. 310-314). The State asked Dr. Dean about other sexually transmitted diseases Ms. Coffel has been diagnosed with; chlamydia, gonorrhea, and herpes (Tr. 311-312). It ultimately asked the question of whether Ms. Coffel's HIV and these other diseases, "might put her in a position of being a little bit more of a risk to other people?" (Tr. 315).

Dr. Lynn Maskel is a Wisconsin licensed forensic psychiatrist with extensive training in sexually violent predator evaluations (Tr. 406-407). She also has specialized training and experience in diagnosing and treating persons with BPD, hundreds of whom have been women (Tr. 407-408). Dr. Maskel diagnosed Ms. Coffel with BPD (Tr. 409). But the doctor testified that it was not a mental abnormality because it did not predispose Ms. Coffel to commit acts of sexual violence (Tr. 410). Nor did Dr. Maskel believe that the disorder caused a significant impairment of Ms. Coffel's volitional control (Tr. 410, 412). She suggested that the pattern of Ms. Coffel's character traits did not deprive her of the ability to conform her behavior to accepted norms (Tr. 411). Whether Ms. Coffel simply chose not to conform is a separate question (Tr. 411).

Dr. Maskel recognized that Ms. Coffel has acted out sexually in the past (Tr. 412). Some of the behavior could be described as sexually violent, but Ms. Coffel has acted out non-sexually violent ways as well (Tr. 413). Promiscuous sex and sex with consenting adults is neither sexually violent nor predatory (Tr. 413). Dr. Maskel noted the ages of the boys involved in the index offense, but further noted that Ms. Coffel's immaturity put her on an emotional level nearer the ages of the boys (Tr. 413-414). The doctor believed that Ms. Coffel remains emotionally immature and much younger than her true age (Tr. 415). Dr. Maskel noted that Ms. Coffel was now nearly twenty-five years old rather than eighteen, and believed that Ms. Coffel had matured and is less likely to be interested in young boys without a paraphelia or sexual interest in children (Tr. 415). Ms. Coffel has never been diagnosed with either (Tr. 415). Dr. Maskel believed that even though Ms. Coffel remains emotionally younger than her chronological age, she was not necessarily drawn to persons under the age of eighteen (Tr. 455). The doctor believed that Ms. Coffel may continue to have problematic sexual behavior, but pointed out that those problems are irrelevant to the forensic question of Ms. Coffel's risk of committing a new sexually violent act (Tr. 415). Whether Ms. Coffel will handle her sexuality in a responsible manner is not the

same as trying to determine her risk of committing a sexually violent act (Tr. 415-416).

Dr. Maskel explained that APD and BPD are diagnoses within the same "cluster" of personality disorders, and the distinction between the two is more a matter of "shading" (Tr. 417-418). She believed that Ms. Coffel's conduct was the result of a borderline personality, motivated by a need for attachments, rather than an antisocial personality (Tr. 418). Dr. Maskel concluded that Ms. Coffel joined a gang to gain a "family," not simply to engage in antisocial acts (Tr. 418-419).

Although Dr. Maskel did not conclude that Ms. Coffel had a mental abnormality as defined by the statute, she included in her report what information is known to psychiatrists and psychologists about the risk of sexual reoffense by women (Tr. 420). What is known in that regard is "very little" (Tr. 420). What is published relates to the typologies of female sex offenders, not recidivism by them (Tr. 420). Dr. Maskel advised that what is known about male sex offenders cannot be applied to female sex offenders because it is necessary to have a base rate, a percentage of reoffense, in the group of people in order to assess risk (Tr. 420). The base rate for men is neither very low nor very high, and thus known factors can assist in assessing risk (Tr. 420-421). What is known

regarding female sex offenders is that the base rate of offense is extremely low (Tr. 422). Dr. Maskel suggested that when the base rate is very low, the risk factors don't really matter (Tr. 422). If the base rate is 3 percent, a risk factor that doubles the risk still presents only a 6 percent chance of reoffense (Tr. 422).

Dr. Maskel said that the "risk" factors applied to Ms. Coffel by Dr. Phenix simply repeated the factors used to diagnose BPD but did not add any new information to an assessment of risk (Tr. 424). She said, "We don't know that [Ms. Coffel] being a borderline personality disorder individual makes her riskier of going out after a period of incarceration, and offending again in a very specific manner, which is a sexually violent manner." (Tr. 424). Dr. Maskel advised the probate court, "We don't know that clinically and we don't know that empirically." (Tr. 425).

Dr. Maskel noted that in comparison to female sex offenders, "[t]here's a whole pile of research on male sex offenders." (Tr. 449). It is possible to identify risk factors for recidivism in men because of the research that has been done (Tr. 449). But she added that it is not possible to take risk factors from one population and apply them to another population unless that second population does not have characteristics that are significantly different from the first (Tr.

449-450). Dr. Maskel testified that Dr. Phenix applied risk factors to Ms. Coffel that are used for male sex offenders (Tr. 424).

Dr. Maskel answered the State that she does render opinions whether persons have a mental disease or defect such as to render then not guilty by reason of insanity, and that she does so without the use of actuarial instruments (Tr. 429-430). No actuarial or risk assessment was necessary to diagnose Ms. Coffel's mental status either (Tr. 430). But Dr. Maskel reminded the State that such a diagnosis renders an opinion of the mental state at a particular time, it is not an attempt to predict future risk (Tr. 430).

Dr. Richard Scott is a licensed psychologist and certified forensic examiner in the Department of Mental Health (Tr. 457). He received special training in SVP evaluations after the Missouri law was passed (Tr. 457). His internship was in borderline personality disorders, and he ran BPD unit of the St. Louis Psychological Rehabilitation Center from 1994 to 1995 (Tr. 458). Although he found characteristics of APD, his primary diagnosis for Ms. Coffel was BPD (Tr. 460). Antisocial personality disorders can be a statutory mental abnormality, but he did not believe that it was in Ms. Coffel's case (Tr. 462). Dr. Scott noted the importance of identifying the manifestation of the disease, the symptoms the person displays (Tr. 462). He testified that Ms. Coffel showed no pattern of

sexually violent or predatory behavior (Tr. 462). "[A]lthough [Ms. Coffel] is impulsive, she does not disregard the consequences of sexual behavior for other people." (Tr. 462). While Ms. Coffel had oral sex with the two boys, she knew that HIV is not transmitted through saliva (Tr. 463). There was no evidence that Ms. Coffel established a relationship with the boys to offend against them in the future (Tr. 464-465). Ms. Coffel's conduct violations in DOC were all minor violations, and the only sexual misconduct violation was a consensual kissing with another inmate (Tr. 466). Dr. Scott believed that Ms. Coffel's behavior was best explained by her borderline personality, using sex to gain affection, attention, and acceptance (Tr. 466).

Dr. Scott acknowledged that APD generally makes a person more likely to offend or reoffend (Tr. 496). But he noted that in male offenders it is more strongly associated with general reoffending, not sexual reoffending (Tr. 508). The best prediction from the presence of APD is for general reoffense, not sexual reoffense (Tr. 508). Some studies of male offenders conclude that APD is a factor in sexual reoffending, some studies conclude that it is not (Tr. 508-509).

Dr. Scott testified that Ms. Coffel's pattern of behavior caused by BPD was not a mental abnormality defined by the statute (Tr. 468). Ms. Coffel was

reportedly promiscuous; a symptom of BPD, but that is not predatory behavior under the statute or in a clinical sense (Tr. 469).

Dr. Scott acknowledged the ages of the boys involved in the index offenses, but he believed that the contact was a result of Ms. Coffel viewing them as "peers" (Tr. 470). Asked if that remained a problem given Ms. Coffel's immaturity, Dr. Scott answered that he did not think that Ms. Coffel would view children that young as peers now that she is twenty-five years old (Tr. 471). The doctor also believed that Ms. Coffel had a relationship with fifteen year old Ahrens that was not simply to have illegal sex (Tr. 521-522). It was a standing relationship that was not predatory (Tr. 521).

Even though he did not find a statutory mental abnormality, Dr. Scott still considered Ms. Coffel's risk to reoffend, recognizing that there might be a disagreement whether BPD or APD amounted to a mental abnormality (Tr. 473). Dr. Scott was aware of two studies on female reoffending sexually (Tr. 474). Both studies reviewed a combined total of 160 to 170 women (Tr. 474). In one study no women reoffended sexually (Tr. 474). Only two women in the other study reoffended (Tr. 474). Dr. Scott testified that these studies established a base rate for reoffense by female sexual offenders of one to one and a half percent (Tr. 474). He said that risk assessment requires knowing the target behavior of the

population that resembles the person being evaluated (Tr. 474). Dr. Scott told the probate court that it is impossible to compare Ms. Coffel to male sex offenders because, "if nothing else is clear," it is well-known that knowledge regarding male sex offenders cannot be applied to female sex offenders (Tr. 474). The motivations and behavior patterns are very different between men and women 474). Men and women have sex for different reasons, and offend for different reasons (Tr. 476). Dr. Scott testified that what is known from the research on female sex offenders is that reoffense is very infrequent (Tr. 475). Regarding the variables which might increase the risk of reoffense for women, Dr. Scott said, "[t]here have been no variables that have been shown to predict reoffending." (Tr. 475).

Dr. Scott also discussed what was known about the accuracy of "clinical judgment" in assessing risk of reoffense in male sex offenders (Tr. 482). Clinical judgment alone is not very effective in assessing risk (Tr. 482). Dr. Scott informed the probate court, "[r]esearch has shown it's overall no better than chance," and that, "[s]ome researchers have found that it's worse." (Tr. 482). Clinical judgment tends to overestimate the risk of reoffense by taking into account factors that are more emotional than empirical (Tr. 482).

Ms. Coffel was called to testify by the State (Tr. 139-140). She learned that she was HIV positive when she was sixteen years old (Tr. 144-145). She was sent to DMH where she was told about medications and taking care of herself, but not about the transmission of the disease (Tr. 146-147). She had to learn about the spread of the disease on her own (Tr. 147). She knew that the disease was difficult to spread through saliva, but had unprotected sex with Ahrens because she did not know the high risk of transmission through intercourse (Tr. 143-144). Ms. Coffel said that Ahrens told her that he was seventeen years old (Tr. 143). While in the Biggs facility, Ms. Coffel had the infection/AIDS advisor put together a booklet of information regarding the disease to help explain it to others (Tr. 178-179, 188-189). The information also taught her how to protect sex partners (Tr. 179).

Ms. Coffel admitted that she had over seventy conduct violations in prison (Tr. 152). Only a couple were for sexual misconduct (Tr. 152, 153-155). She knew that she was not supposed to have sexual contact with other inmates (Tr. 154). She denied flirting with staff or exposing herself to others, although she knew that other people said that she had done those things (Tr. 159). She acknowledged that she once got in trouble to yelling to another inmate, and once for sending a letter to another inmate (Tr. 159). Ms. Coffel testified that she

wrote letters to another patient at Biggs, but that she was looking for a non-sexual relationship (Tr. 157-158). She stopped writing to the man because it became apparent that with his mental condition he would never be released from DMH (Tr. 158). Ms. Coffel agreed that she likes women more than men because she had been through so much more with men (Tr. 158). She had been beaten by her father and by other men (Tr. 158).

Ms. Coffel understood that as a teenager she used sex to make friends and to fit in (Tr. 163). She learned that from her mother who was having sex with a lot of men (Tr. 163). Ms. Coffel told the probate court that she no longer cared about that (Tr. 163). She graduated from two different programs in DOC: Safety Prison Smart Foundation where she learned to deal with frustration; and Breaking Barriers where she learned to put her past behind her (Tr. 168, 169). Ms. Coffel admitted that she still gets frustrated and acts out, but the Prison Smart program helped her handle anger and frustration better (Tr. 168). Her past had been chaotic, and the Breaking Barriers program helped to act differently now (Tr. 169-170). Her outlook was now more positive than negative (Tr. 170). One way her outlook has changed is that if a person does not want to be her friend, then she can live without the person (Tr. 170). Ms. Coffel said that she was unable to do that in the past; she needed someone to be there for her (Tr.

170-171). She told the probate court that she had changed sexually; she used to have to "buy" friends but did not need that any more (Tr. 171).

Ms. Coffel admitted that she told Dr. Maskel that if she got out she was going to check the identification of people who wanted to hang out with her to make sure the person was over twenty years old (Tr. 161). She knew that having sex with young boys was not a good way to make friends because it would cause her to go back to prison (Tr. 163-164). That was not the kind of life Ms. Coffel wants to live (Tr. 184). Nor did she find children sexually attractive (Tr. 180-181). She said that she was not really interested in getting into a relationship if she was released; she had other priorities including her health and education (Tr. 156). She agreed that she was not saying that she would not have sex again, only that she had priorities above getting into a sexual relationship (Tr. 157).

After hearing the evidence and arguments of counsel, the probate court found "that the State has proven beyond a reasonable doubt that the Respondent has a mental abnormality, and Respondent's abnormality predisposes her to criminal predatory acts of sexual violence, and if not treated, the Respondent will continue to commit sexually violent offenses." (Tr. 538). The probate court committed Ms. Coffel to the Department of Mental Health (L.F. 160). Ms. Coffel appealed on August 20, 2001 (L.F. 162-165).

POINTS RELIED ON

I.

The trial court erred and abused its discretion when it entered judgment against Coffel without first considering whether, as a result of a mental abnormality she had serious difficulty in controlling her behavior, as required by law. Coffel was prejudiced by the trial court's error because there is no indication in the record that the court specifically found that Coffel had serious difficulty in controlling her sexually violent behavior, which is a necessary predicate to finding her to be a SVP. The judgment is therefore the result of misapplication of the law. As a result, the trial court denied Coffel her rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse and remand for a new trial.

In re the Care and Treatment of Spencer, 103 S.W.3d 407**,** (Mo. App., S.D. 2003);

Kansas v. Crane, 122 S.Ct. 867 (2002);

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997);

Thomas v. State, 74 S.W.3d 789 (Mo. banc 2002);

United States Constitution, Fifth, Sixth, Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10, 18(a);

Section 632.480, RSMo 2000.

II.

The trial court erred when it entered judgment because the evidence adduced at trial did not support the claims alleged in the Petition. The state failed to prove that the mental abnormalities pleaded in the petition, sexual sadism and alcohol abuse, make Coffel more likely than not to sexually violently reoffend if not confined. Coffel was prejudiced because she has been committed when the evidence presented did not conform to the pleadings, and did not support her need for commitment. The judgment was therefore not based on substantial evidence, was against the weight of the evidence, and/or misapplied the law. The trial court's rulings deprived Coffel of her rights to due process and a fair trial as guaranteed by Article I, Sections 10 and 18(a) of the Missouri Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In Re Johnson, 58 S.W.3d 490 (Mo. banc 2001);

State v. Burkemper, 882 S.W.2d 193 (Mo.App., E.D. 1994);

Delaporte v. Robey Building Supply, 812 S.W.2d 526 (Mo.App., E.D. 1991);

Sisk v. McIlroy & Assoc., 934 S.W. 2d 569 (Mo. App., S.D. 1996);

United States Constitution, Fifth, Sixth, Fourteenth Amendments;

Missouri Constitution, Article I, Section 10, 18(a);

Sections 632.480, 632.495 RSMo 2000;

Rule 41.01, 78.07, 84.13.

III.

The trial court erred when it entered judgment against Coffel because the ruling was against the weight of the evidence. The overwhelming weight of the evidence in this case showed that while Coffel suffered from personality disorders, she did not meet the statutory criteria of a SVP, and the weight of the evidence with regard to risk of reoffense showed that she had a miniscule chance of reoffending in a sexually violent manner. Coffel was prejudiced by the trial court's error because the state simply failed to demonstrate that Coffel met the criteria of a SVP. The judgment is therefore not based upon substantial evidence, is against the weight of the evidence, and/or the result of misapplication of the law. As a result, the trial court denied Coffel her rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse the judgment of the probate court and release Ms. Coffel from confinement.

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976);

Mohundro v. Nelson, 69 S.W.3d 908 (Mo. App., E.D. 2002);

Kansas v. Crane, 122 S.Ct. 867 (2002);

Kansas v. Hendricks, 117 S.Ct. 2072 (1997);

United States Constitution, Fifth, Sixth, Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10, 18(a);

Sections 632.480, 632.489, 632.495 RSMo 2000.

IV.

The trial court erred when it denied Coffel's motion to dismiss the state's petition because the SVP statute violates the Equal Protection Clauses of Article I, Section 2 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Equal Protection requires that similarly situated persons be treated similarly. If a person is involuntarily committed to DMH for reasons other than a SVP finding, the DMH must place her in the least restrictive environment. The SVP statute has no such requirement – any person found to be a SVP is automatically committed to the custody of the DMH and placed in a secure facility with no regard for whether that person can be placed in a less restrictive environment. There is no rational basis for the disparate treatment of the two classes of persons. Coffel was prejudiced by the trial court's error because there was no evidence of or consideration given to placing her in the least restrictive environment. Thus, Coffel was deprived of her liberty pursuant to a statute that, on its face and as applied, violates the Equal Protection Clauses.

Baxstrom v. Herold, 86 S.Ct. 760, 763 (1966);

Detention of Brooks, 36 P.3d 1034, 1040 (Wash. 2001);

Ex parte Wilson, 48 S.W.2d 919, 921 (Mo. banc 1932);

In re Young, 857 P.2d 989 (Wash. 1993);

United States Constitution, Fifth and Fourteenth Amendments;

Missouri Constitution, Article I, Section 2;

Section 552.040, RSMo 2000;

Section 556.061, RSMo 2000;

Section 630.115, RSMo 2000;

Section 632.300, RSMo 2000;

Section 632.355, RSMo 2000;

Section 632.365, RSMo 2000; and

Section 632.495, RSMo 2000.

ARGUMENT

I.

The trial court erred and abused its discretion when it entered judgment against Coffel without first considering whether, as a result of a mental abnormality she had serious difficulty in controlling her behavior, as required by law. Coffel was prejudiced by the trial court's error because there is no indication in the record that the court specifically found that Coffel had serious difficulty in controlling her sexually violent behavior, which is a necessary predicate to finding her to be a SVP. The judgment is therefore the result of misapplication of the law. As a result, the trial court denied Coffel her rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse and remand for a new trial.

Ms. Coffel stood trial on July 19, 2001 (Tr. 6). In narrow circumstances, a state may civilly confine a person with a mental abnormality or illness which causes them to suffer a volitional impairment rendering them dangerous beyond their control. ***Kansas v. Hendricks***, 117 S.Ct. 2072, 2079-2080 (1997). Missouri

defines a mental abnormality as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Section 632.480(2), RSMo 2000.

Dr. Phenix asserted that Ms. Coffel's borderline personality disorder and antisocial personality disorder resulted in absolutely no volitional control (Tr. 360-361). Dr. Maskel testified that Ms. Coffel's borderline personality disorder did not rise to a mental abnormality under the statute because it does not predispose her to commit acts of sexual violence and she questioned the degree to which the disorder impaired Ms. Coffel's volitional control (Tr. 409-410). Dr. Maskel completely disagreed with Dr. Phenix's conclusion that Ms. Coffel had no control over her behavior as a result of the disorder (Tr. 410). Dr. Maskel testified that the pattern of Ms. Coffel's character traits did not deprive her of the ability to conform her behavior to norms or laws (Tr. 411). Whether Ms. Coffel chooses to conform is a separate question (Tr. 411). Dr. Maskel thought that the disorder might cause some volitional impairment, but not a large impairment (Tr. 412). The doctor testified that what impairment might exist was not enough to fit the statutory definition (Tr. 412).

The State asked Dr. Maskel in cross-examination where she found in the Missouri statute a requirement that the mental abnormality have a "substantial impact" on volitional control (Tr. 426). Dr. Maskel answered that the statute "does not give us any direction on quantification." (Tr. 426). The State responded, "Does not the definition of mental abnormality, under Missouri law, require the mental abnormality to affect the emotional or volitional capacity?" (Tr. 426). Dr. Maskel agreed that is what the statute says (Tr. 426). The State then repeatedly questioned Dr. Maskel about the definition requiring only an "affect" on volitional control, not a substantial impact (Tr. 426). Dr. Maskel continued to answer that the quantity of affect was not defined, and Ms. Coffle's disorder did not cause a substantial impact on her volitional control (Tr. 426-427).

The State referred to the statutory definitions during closing argument and trusted the probate court to apply those statutes to the case:

> I'm not going to argue the statute with the Court. Some of the witnesses had various interpretations, and I am very confident that the Court will look at the statute, know what is required and not required. I think it is clear that she does suffer from a mental abnormality that does predispose her to commit sexually violent offenses….

(Tr. 529). The State reminded the court that APD "makes it more likely that you are going to disregard the laws." (Tr. 529). It argued as proof the evidence of Ms. Coffel's conduct violations in prison where she could not "abide by the rules" (Tr. 529-530). The State argued that Ms. Coffel could not control herself (Tr. 530). From this it concluded: "But she has committed sexually violent acts and she will commit sexually violent acts in the future because of this mental abnormality that predisposes her to commit these crimes if she is not confined in her place for treatment." (Tr. 530).

After hearing the evidence and arguments of counsel, the probate court found "that the State has proven beyond a reasonable doubt that the Respondent has a mental abnormality, and Respondent's abnormality predisposes her to criminal predatory acts of sexual violence, and if not treated, the Respondent will continue to commit sexually violent offenses." (Tr. 538). The probate court made no finding regarding the degree of impairment over volitional control caused by Ms. Coffel's disorder, only that it predisposed her to commit predatory acts of sexual violence. This is not surprising because at the time, no court had quantified the level of impairment of volitional capacity necessary to permit a civil commitment.

That changed in 2002 when the United States Supreme Court decided ***Kansas v. Crane***, 122 S.Ct. 867 (2002). The ***Crane*** court held that complete inability to control behavior was not required; it was enough to show "serious difficulty in controlling behavior." ***Id.*** at 868. This quantification of the degree of impairment was adopted by the Missouri Supreme Court in ***Thomas v. State***, 74 S.W.3d 789, 791 (Mo. banc 2002). Following ***Thomas***, the State must prove that the mental abnormality causes the person "serious difficulty controlling his or her behavior." ***Id***. The Missouri statute did not change, but the Missouri Supreme Court required that a jury be instructed that a mental abnormality means "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses *in a degree that causes the individual serious difficulty in controlling his behavior*" ***Id***. at 792 (emphasis added).

This quantification of the degree of impairment must be found by the court in a bench trial as well. ***In re the Care and Treatment of Spencer***, 103 S.W.3d 407 (Mo. App., S.D. 2003). The trial and commitment in ***Spencer*** also occurred prior to the Missouri Supreme Court's decision in ***Thomas***. Although there was evidence that Spencer was a pedophile, which arguably could suggest serious difficulty controlling behavior, the Southern District nonetheless reversed the

judgment and remanded the case because, "given that ***Thomas*** was not yet decided, and thus not controlling at the time of trial, assuming that any finding regarding serious difficulty was made in accordance with the result would be unfair and improper since such was not a fact at issue or contested at trial." ***Id***. at 417.

It is apparent from the record in Ms. Coffel's case that while the degree of impairment was raised during the trial, the State specifically focused on the statutory language which is devoid of the necessary element of serious difficulty controlling behavior. And whether the mental abnormality predisposed Ms. Coffel to acts of sexual violence was certainly contested (Tr. 412, 426-427). The State used its cross-examination of Dr. Maskel to demonstrate that the statute required only an "affect" on volitional control, not a substantial impact (Tr. 426-427). A "substantial impact" is more in line with the requirement of "serious difficulty." But the State focused its attention only on the statutory requirement of an "effect" on volitional control, and trusted the probate court to follow the statutory definition (Tr. 529). The motion court found nothing more than the statutory language, only that Ms. Coffel's mental abnormality predisposed her to acts of sexual violence (Tr. 538). ***Thomas*** teaches that a finding limited to the statutory language is constitutionally insufficient to support civil confinement.

Because the State failed to prove, and the probate court failed to find that any existing mental abnormality caused Ms. Coffel "serious difficulty" controlling her behavior, the judgment of the probate court must be reversed and the cause remanded for a new trial.

II.

The trial court erred when it entered judgment because the evidence adduced at trial did not support the claims alleged in the Petition. The state failed to prove that the mental abnormalities pleaded in the petition, sexual sadism and alcohol abuse, make Coffel more likely than not to sexually violently reoffend if not confined. Coffel was prejudiced because she has been committed when the evidence presented did not conform to the pleadings, and did not support her need for commitment. The judgment was therefore not based on substantial evidence, was against the weight of the evidence, and/or misapplied the law. The trial court's rulings deprived Coffel of her rights to due process and a fair trial as guaranteed by Article I, Sections 10 and 18(a) of the Missouri Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The state filed its Petition pursuant to Section 632.480 RSMo (Cum.Supp. 1999) (L.F. 7-19). In that Petition, the state alleged that Ms. Coffel "may meet the criteria of a sexually violent predator" because she had been convicted of a sexually violent offense, and that "respondent is currently suffering from Antisocial Personality Disorder, Sexual Sadism *and* Alcohol Abuse, mental

abnormalities, which make her more likely than not to engage in predatory acts of sexual violence if released". (L.F. 7) (emphasis added).

The trial court proceeded to try Ms. Coffel and enter a judgment finding her to be a SVP and committing her involuntarily pursuant to Section 632.480 (Tr. 1, et seq.; L.F. 160).

By virtue of the fact this is a court-tried case, Ms. Coffel was not required to file a motion for new trial. Rule 78.07. In any event, the rules of civil procedure do not apply to probate proceedings absent the trial court's order that they shall. Rule 41.01. The trial court did not do so in this case. Should this Court disagree, Ms. Coffel asserts that manifest injustice would result if left uncorrected, and requests plain error review. Rule 84.13(c).

The standard of review for a court-tried case requires the appellate court to affirm the judgment unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the court erroneously declares or applies the law. ***Mohundro v. Nelson***, 69 S.W.3d 908, 910 (Mo.App.E.D. 2002).

Section 632.495, RSMo, requires the state to prove beyond a reasonable doubt that Ms. Coffel is a SVP. By virtue of the fact that the state has chosen to make reasonable doubt the standard, Ms. Coffel has a due process right to

require the state to meet that standard. Civil commitment for any purpose is a significant deprivation of liberty that requires due process protection. ***Addington v. Texas***, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809 (1979). State statutes that have the force and effect of law can create an interest to be protected by the due process clause. ***Vitek v. Jones***, 454 U.S. 480, 488, 100 S.Ct. 1254 (1980). Once a state has afforded an opportunity for that interest, due process requires the interest not be arbitrarily denied or abrogated. ***Greenholtz v. Nebraska Penal Inmates***, 442 U.S. 1, 99 S.Ct. 2100 (1979); ***Morrissey v. Brewer***, 408 U.S. 471, 92 S.Ct. 2593 (1972); ***Wolff v. McDonnell***, 418 U.S. 539, 94 S.Ct. 2963 (1974). Once a rule of procedure is in place, therefore, that rule must comport with due process. ***United States v. MacCollum***, 426 U.S. 317, 323, 96 S.Ct. 2086 (1976). Here, the State's evidence leads to a doubt based upon reason and common sense, because the State failed to prove that the mental abnormality pleaded in the petition makes Ms. Coffel more likely than not to reoffend.

Section 632.480(5) defines a SVP as "any person who suffers from a mental abnormality **which** makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility…". Put differently, the State must prove the existence of a mental abnormality, and that it is the proven mental abnormality that has to make the person more likely than

not to sexually violently reoffend before he meets the definition of a SVP and is eligible for involuntary civil commitment. Further, the State specifically pleaded that Ms. Coffel "is currently suffering from Antisocial Personality Disorder, Sexual Sadism *and* Alcohol Abuse, mental abnormalities, which make her more likely than not to engage in predatory acts of sexual violence if released" (L.F. 7).

The obvious source of the mental abnormalities alleged in the petition are the End of Confinement report prepared by Rebecca Woody (L.F. 12-19). It should be noted that Ms. Woody is not qualified to diagnose and testify in Missouri, because she is not a licensed psychiatrist, psychologist, or clinical social worker. ***In re Johnson***, 58 S.W.3d 496, 498 (Mo.banc 2001); Sections 337.015.3, 337.500, 337.600, RSMo. Here, the state failed to prove everything it charged. Specifically, the state failed to prove that Ms. Coffel suffered from sexual sadism, and failed to prove that alcohol abuse predisposed Ms. Coffel to engage in predatory acts of sexual violence. Where an act constituting a crime is specified in a charge, the State is held to proof *of that act*, and a conviction will lie only on proof of that act. ***State v. Burkemper***, 882 S.W.2d 193, 196 (Mo.App.E.D. 1994). Evidence in a trial must conform to the pleadings. ***Delaporte v. Robey Building Supply***, 812 S.W.2d 526, 534 (Mo.App.E.D. 1991). A court may only decide

questions presented by the parties in their pleadings. ***Sisk v. McIlroy & Assoc.***, 934 S.W.2d 567, 571 (Mo.App.S.D. 1996).

The State's evidence on this issue consisted of Dr. Phenix's testimony. Dr. Phenix diagnosed Ms. Coffel with ASPD and BPD, and stated they predisposed her to commit sexually violent offenses (Tr. 361, 362). Dr. Phenix said nothing about sexual sadism (Tr. 324-397). Drs. Dean and Scott specifically debunked any notion that Ms. Coffel suffers from sexual sadism (Tr.239, 475). Dr. Scott went so far as to say that Ms. Woody was "not even in the ballpark with that diagnosis" (Tr. 475). Dr. Scott was the only expert to diagnose Ms. Coffel with any sort of substance abuse, but specifically stated that it did not qualify as a mental abnormality because it does not presdispose a person to commit sexually violent offenses (L.F. 72).

Because the State failed to prove that *sexual sadism and alcohol abuse* were mental abnormalities that will make Ms. Coffel more likely than not to commit predatory acts of sexual violence if not in a secure facility, the State failed to meet its burden of proof. The trial court should not have entered judgment against her because the State failed to prove by substantial evidence the allegations in its petition. The trial court's ruling prejudiced Ms. Coffel because she does not meet the definition of a SVP as pleaded by the State, and she should not be committed.

For the forgoing reasons, the trial court's error violated Ms. Coffel's rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse the judgment of the lower court and order that Ms. Coffel be discharged from custody, or in the alternative remanded for a new trial in this matter.

III.

The trial court erred when it entered judgment against Ms. Coffel because the ruling was against the weight of the evidence. The overwhelming weight of the evidence in this case showed that while Ms. Coffel suffered from personality disorders, she did not meet the statutory criteria of a SVP, and the weight of the evidence with regard to risk of reoffense showed that she had a miniscule chance of reoffending in a sexually violent manner. Ms. Coffel was prejudiced by the trial court's error because the state simply failed to demonstrate that Ms. Coffel met the criteria of a SVP. The judgment is therefore not based upon substantial evidence, is against the weight of the evidence, and/or the result of misapplication of the law. As a result, the trial court denied Ms. Coffel her rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution.

To commit Ms. Coffel to DMH as a sexually violent predator, the State had to present evidence proving beyond a reasonable doubt that she (1) has a congenital or acquired condition affecting her emotional or volitional capacity that predisposes her to commit sexually violent offenses to a degree that causes

her serious difficulty controlling her behavior; and (2) that she is more likely than not to engage in predatory acts of sexual violence if not confined. Sections 632.480(2), 632.489(5), 632.495; ***Thomas v. State***, 74 S.W.3d 789, 791-792 (Mo. banc 2002). The standard of review in a court-tried civil case requires the appellate court to reverse the judgment if there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. ***Murphy v. Carron***, 536 S.W.2d 30, 32 (Mo. banc 1976); ***Mohundro v. Nelson***, 69 S.W.3d 908, 910, (Mo. App., E.D. 2002). In the present case, the State's evidence that Ms. Coffel meets the two criteria set out in ***Thomas*** was insubstantial and the judgment committing Ms. Coffel is against the weight of the evidence.

Ms. Coffel's commitment rests on the testimony of two State's witnesses, Ms. Davin and Dr. Phenix. Both doctors asserted that Ms. Coffel is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility (Tr. 123-124, 376). But these mere assertions are not proof beyond a reasonable doubt. Black's Law Dictionary, Fifth Edition, West Publishing Co., 1979, defines "beyond a reasonable doubt" as "fully satisfied, entirely convinced, satisfied to a moral certainty." Review of the doctors' testimony reveals how insubstantial their assertions really are.

No substantial evidence supports the judgment.

Ms. Davin's nine year old doctoral dissertation only identified characteristics of female sex offenders, not factors associated with risk of sexual reoffense by women (Tr. 137-138). Other than identifying Ms. Coffel as an independent offender, Ms. Davin's study has no application to the case (Tr. 138). Ms. Davin admitted "… we have no way of knowing or no idea whether those characteristics have anything to do with whether a person will sexually violently reoffend." (Tr. 138).

Ms. Davin also admitted that there is no "existing substantial body of research on female sex offenders that is available to answer the question whether or not Ms. Coffel is more likely than not to reoffend" (Tr. 117-118). At this point the State abandoned the proper function of its efforts to commit Ms. Coffel as a sexually violent predator; to determine whether she has a mental disorder "that would actually predispose [her] to do a *very specific type of offense, and that would be a sexual offense*," and to make an accurate prediction that Ms. Coffel is more likely than not to "go on to continue to exhibit *deviant sexuality*." (Tr. 333-334) (testimony of Dr. Phenix). Instead, the State asked Ms. Davin whether she was aware of "factors that you believe can assist either a mental health professional or a trier of fact whether or not someone is more or less likely to reoffend in the

future" (Tr. 118). This question asked about factors for *general* criminal offense and reoffense, not whether a person is more likely than not to engage in predatory acts of sexual violence, two terms that have very specific legislative definitions.

It is not enough for the State to suggest through its witnesses that Ms. Coffel presents a risk to commit crimes in general. The State had to prove beyond a reasonable doubt that Ms. Coffel will more likely than not engage in "acts directed toward strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization." Section 632.480(3), RSMo 2000.[4] The State was also required to prove that Ms. Coffel was more likely than not to commit the offenses of forcible rape, rape, statutory rape in the first degree, forcible sodomy, sodomy, statutory sodomy in the first degree, or an attempt to commit any of those crimes, child molestation in the first or second degree, sexual abuse, sexual assault, deviate sexual assault, or abuse of a child involving sexual contact. Section 632.480(4), RSMo 2000. Dr. Phenix

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[4] Amended following Ms. Coffel's trial to require "acts directed toward other individuals, including family members, for the primary purpose of victimization." Section 632.480, Cum. Supp. 2001.

accurately described the State's burden in this case: to determine whether Ms. Coffel has a mental disorder "that would actually predispose [her] to do a *very specific type of offense, and that would be a sexual offense*," and to make an accurate prediction that Ms. Coffel is more likely than not to "go on to continue to exhibit *deviant sexuality*." (Tr. 333-334). Unable to meet this burden, the State instead chose to involuntarily commit Ms. Coffel to secure confinement on testimony that Ms. Coffel has a mental condition, antisocial personality disorder or borderline personality disorder that is associated with *general* criminality. Having abandoned its burden of proving the necessary statutory elements, the State has no authority to commit Ms. Coffel as a sexually violent predator.

The State of Missouri is not authorized to civilly commit Ms. Coffel or anyone else as a sexually violent predator due to a mental condition that may lead them to commit crimes in general. In ***Kansas v. Crane***, 122 S.Ct. 867, 870, 2002), the United States Supreme Court explained and reiterated its previous ruling in ***Kansas v. Hendricks***, 117 S.Ct. 2072 (1997):

> *Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." That distinction is necessary

> lest "civil commitment" becomes a "mechanism for retribution or general deterance" – functions properly those of criminal law, not civil commitment.

Crane, 122 S.Ct. at 870 (internal citations omitted). The United States Supreme Court continuted:

> [P]roof of serious difficulty in controlling behavior … must be sufficient to distinguish the dangerous sexual offender whose serious illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Id.

Missouri civilly committed Ms. Coffel as a "mechanism for … general deterrence." Ms. Davin and Dr. Phenix both acknowledged that no known risk factors exist to either establish or assist professionals, judges or juries to determine whether a female sex offender will engage in predatory acts of sexual violence (Tr. 117-118, 389). The State therefore called upon Ms. Davin to testify that antisocial personality disorder is associated with general criminal offending and reoffending. The most the State could prove with Ms. Davin's testimony is that Ms. Coffel may engage in criminal behavior, among which may be sex offenses involving children. Ms. Davin's testimony not only fails to distinguish

Ms. Coffel from "the dangerous but typical recidivist," but she used general criminal redicivism to conclude that Ms. Coffel should be civilly committed as a sexually violent predator. The State fell far short of the civil commitment authority granted by ***Hendricks*** and ***Crane***.

Of the specific risk factors identified by Ms. Davin, most were simply repetitions of the characteristics she observed in female sex offenders. It is not surprising that Ms. Coffel demonstrates some of these characteristics. She is a female sex offender. Ms. Davin considered Ms. Coffel's confused sexual identity as a risk factor (Tr. 123-124). A characteristic of female sex offenders is identity problems (Tr. 102). Ms. Davin considered as risk factors Ms. Coffel's lack of empathy and lack of regard for others or for the law or societal norms (Tr. 123-125). These match characteristics she identified: lack of empathy or remorse (Tr. 108). Ms. Davin considered as a risk factor that Ms. Coffel entered into relationships with persons she knew little about (Tr. 123-124). This sounds like the characteristic of superficial relationships (Tr. 99). Ms. Davin considered it a risk factor that Ms. Coffel had, *in the past*, been in a relationship with underage boys (Tr. 123-124). A characteristic of female sex offenders is that the offense was against persons under the age of eighteen (Tr. 122). Ms. Davin considered it a risk factor that Ms. Coffel acted out sexually in DOC and DMH, showing that she

would pursue what she wants without regard to consequences (Tr. 125). This seems to be the characteristics of problems with authority and defiance of rules (Tr. 97). But as Ms. Davin admitted, "[W]e have no way of knowing or no idea whether those characteristics have anything to do with whether a person will sexually violently reoffend." (Tr. 138). While Ms. Davin admitted that, she nonetheless asserted based primarily on the characteristics of a female sex offender that Ms. Coffel was more likely than not to sexually reoffend. By Ms. Davin's own admission there is no substantial weight to her assertion – we don't know if the characteristics she relied upon have anything to do with reoffense.

Ms. Davin identified only a few "factors" independent of the "characteristics" she identified. The first of those "risk factors" was that Ms. Coffel asked for birth control upon her release from DOC, suggesting that she intended to remain sexually active (Tr. 130). Consensual sexual intercourse with an adult is neither predatory nor a sexually violent offense as those terms are defined by the SVP law. That Ms. Coffel may be sexually active is a far cry from evidence establishing that she is more likely than not to engage in predatory acts of sexual violence. At most, this only shows that Ms. Coffel may choose not to be

celibate. The State cannot civilly commit Ms. Coffel simply because, like Ophelia, she chooses not to get herself to a nunnery. [5]

Another "risk factor" not contained in Ms. Davin's list of characteristics is the correlation between antisocial personality disorder and "criminality in general." (Tr. 129-130). Ms. Davin was "concerned" that this potential "criminality in general" would be demonstrated by Ms. Coffel reoffending in the manner she had before (Tr. 129-130). But Ms. Davin pointed to nothing to suggest a continuing sexual deviancy or desire to engage in sexual relations with children. Ms. Davin was doing nothing more than worrying that because Ms. Coffel had done it once, she might do it again. The doctor's concern is not substantial evidence of the required elements for a civil commitment. In the first place, it is only a "concern" not a substantiated and recognized factor relating to risk of sexual reoffense. And in the second place, ***Hendricks*** and ***Crane*** prevent the State from using "criminality in general" as a justification for civil commitment.

The last "risk factor" Ms. Davin suggested was Ms. Coffel's failure to complete MOSOP treatment in DOC (Tr. 123-124). Dr. Phenix informed the probate court that she reviewed an article, "Female Sex Offenders and Literature

[5] William Shakespeare's *Hamlet***,** Act III, Scene I.

Review," prepared for the Solicitor General of Canada, which noted the models for male sex offender treatment do not apply to female sex offenders (Tr. 385-386). Yet again, there is no way of knowing whether the lack of treatment is a factor in female sexual reoffending. Without this knowledge Ms. Davin's opinion means nothing.

Dr. Phenix likewise began by acknowledging that there is no determined set of factors which relate to risk of reoffense by female sex offenders (Tr. 389). So she, too, then looked elsewhere for "factors" upon which she could express an opinion that Ms. Coffel has a mental disorder "that would actually predispose [her] to do a *very specific type of offense, and that would be a sexual offense*," and to make an accurate prediction that Ms. Coffel is more likely than not to "go on to continue to exhibit *deviant sexuality*." (Tr. 333-334). Her testimony fails in the same manner as that of Ms. Davin.

On the first element, Dr. Phenix suggested that either APD or BPD was a congenital or acquired condition affecting Ms. Coffel's emotional or volitional capacity that predisposes her to commit sexually violent offenses to a degree that causes her serious difficulty controlling her behavior. Dr. Phenix asserted that the APD predisposed Ms. Coffel to sexually violent offenses because it caused a lack of empathy, a disregard for social norms, and allowed her to violate rules

(Tr. 361). In this sense, Dr. Phenix's testimony violates the limited authority permitted by ***Hendricks*** and ***Crane*** by failing to distinguish the narrow class of sexually violent predators from the much broader class of general criminal recidivists. The doctor said that the disorder affected Ms. Coffel's volitional capacity because she was running "amok" sexually with no apparent need to control herself (Tr. 362). Basically, Dr. Phenix was saying that Ms. Coffel is promiscuous. Again, where is testimony regarding predisposition to predatory conduct and sexually violent offenses defined by the statutes? It is still missing. Dr. Phenix tried to make that leap by finally asserting the belief that Ms. Coffel's increased interest in sex coupled with a disregard for other people "sets the stage and allows for … the kind of deviant sexual behavior we saw committed in the offenses." (Tr. 362). Sets the stage and allows for that behavior. The mental condition described by Dr. Phenix might enable predatory acts of sexual violence, but that certainly is not the same as establishing a predisposition toward that behavior. Predisposed means to make someone inclined to do something in advance. The American Heritage College Dictionary, Third Edition, Houghton Miflin Company, 1993. Dr. Phenix testified only that APD could enable Ms. Coffel to engage in the same behavior again, not that she was inclined in advance to do so. Indeed, Dr. Phenix agreed that Ms. Coffel's

offenses were impulsive, not planned (Tr. 360). And Dr. Phenix testified that APD alone did not predispose Ms. Coffel toward predatory acts of sexual violence, but only in conjunction with the doctor's diagnoses of BPD and alcohol dependence (Tr. 341, 355, 361).

The diagnosis of alcohol dependence does not change the evidence. Dr. Phenix added it to the mix on the basis that it decreases a person's ability to make reasonable choices. Again, she testifies only to generalities, not elements specific to predatory behavior and sexually violent acts. And further, Ms. Coffel had been confined for six years and there was no evidence that she continued to abuse alcohol or similar intoxicants during her incarceration. Dr. Phenix made this diagnosis based on Ms. Coffel's reported history that she began drinking at an early age and drank to drunkenness (Tr. 341). Dr. Phenix failed to suggest why she was afraid of this "mental abnormality" after six years of sobriety, but her obvious purpose was to simply make the assertion.

Dr. Phenix asserted that borderline personality disorder made Ms. Coffel more likely than not to engage in predatory acts of sexual violence (Tr. 361). She drew this conclusion from the characteristics of the disorder: disruption of interpersonal relationships, emptiness, a void in self-identity, impulsivity such as promiscuity, impulsivity in reaction to fear of abandonment, immaturity, and a

desperate need for closeness (Tr. 355). This too fails to answer the question: where is evidence that the result is predatory acts of sexual violence? Promiscuity and difficult relationships,perhaps. But there is no evidence that the disorder leads to acts toward strangers or relationships established for the purpose of victimization. There is no evidence that the disorder will cause Ms. Coffel to commit rapes, sodomies, statutory rapes or statutory sodomies, or child abuse or molestation. The disorder leads only to general conclusions regarding Ms. Coffel's behavior; that she may engage in unsatisfactory relationships and use sex to fill a void in her life. That the disorder leads to predatory acts of sexual violence is rank speculation by a psychiatrist who admits that there is no "determined list of risk factors" for sexual reoffense by women (Tr. 332, 389).

Dr. Phenix did assert that there was an element of impulsivity in the index offenses with the eleven and thirteen year old boys (Tr. 360). The doctor identified impulsivity as a characteristic of BPD (Tr. 355). This may lead one to conclude that Ms. Coffel is therefore likely to engage in sexual relations with young boys again. This would be an incorrect conclusion. Dr. Phenix asserted that the ages of the children was important, claiming that while only one incident, it suggested a deviant interest (Tr. 366-367). But notably, Dr. Phenix did *not* diagnose a mental abnormality specifically related to a deviant interest in

children. Without identifying a basis to believe that Ms. Coffel is specifically attracted to children, there is no basis to believe that she *is more likely than not* to reoffend in a manner involving children. Ms. Davin's testimony suggests nothing more than that because Ms. Coffel engaged in sexual relations with children before, she might do it again. This is simply a fear or a concern that she might "do it again," not proof beyond a reasonable doubt that she *is* more likely than not to do it again. Dr. Phenix was aware of Ms. Coffel's relationship with fifteen year old Ahrens, but the doctor did not find a deviant interest in that relationship, only poor judgment and risky behavior (Tr. 366, 368-369).

Another factor Dr. Phenix asserted for believing that Ms. Coffel is more likely than not to engage in predatory acts of sexual violence is what the doctor described as Ms. Coffel's "hyper-sexuality" (Tr. 363-364). The doctor applied this description to Ms. Coffel's promiscuity as a young child and her sexual experiences with men before she went to prison and with women after (Tr. 365). This again "proves" nothing more than that Ms. Coffel is sexually active to the point of being promiscuous. Promiscuity is neither predatory nor sexually violent. Dr. Phenix asserted that Ms. Coffel's sexual relations with men and women enlarged the "pool" of potential victims (Tr. 365). But she did not, and cannot, assert that it enlarges the victim pool to include children, to include

predatory acts of sexual violence. All Dr. Phenix is really saying is that Ms. Coffel should be confined as a sexually violent predator because she is promiscuous and bi-sexual. This is not a basis for involuntary civil commitment.

The other factors relied upon by Dr. Phenix to assert that Ms. Coffel is a sexually violent predator are, in fact, even more dubious than those discussed above. She relied upon the lack of sex offender treatment (Tr. 369). But she is aware of the Canadian study that treatment models for male sex offenders are inapplicable to female sex offenders (Tr. 385-386). Since Dr. Phenix identified no treatment model designed for women, and since Dr. Phenix nor anyone else knows what the risk factors for female sexual reoffense are, what sort of treatment does Dr. Phenix expect Ms. Coffel to complete? With no treatment model and no knowledge of risk factors, how substantial can Dr. Phenix's assertion that lack of "treatment" makes Ms. Coffel more likely than not to reoffend? These are not hypothetical questions. These are questions which must be answered, but were not answered by the doctor's assertions.

Other "risk factors" identified by Dr. Phenix were Ms. Coffel's desire to have children in the future, her age and immaturity, and her negative moods (Tr. 372-375). The doctor said that Ms. Coffel's interest in having children was "unrealistic" (Tr. 373). Why is that unrealistic? Dr. Phenix simply chose to

describe that as attention seeking behavior which necessarily involves sex (Tr. 373). Her assertions are not proof. The same is true with the doctor's concern that Ms. Coffel will engage in sexual relations to make herself feel better (Tr. 375). So what? Where is the proof beyond a reasonable doubt that Ms. Coffel's sexual relations to feel better are predatory acts of sexual violence as defined by the commitment statutes? Dr. Phenix said Ms. Coffel's age and immaturity were risk factors for reoffense (Tr. 372, 374). Dr. Phenix's "treatment plan" in this regard was the passage of time: "One would hope that as [Ms. Coffel] became older, that she would then physically, with some help, develop the kind of skills to remain in the community successfully and appropriately channel her sexuality." (Tr. 374). How old does Ms. Coffel have to be before Dr. Phenix thinks she can be released from confinement? Ms. Coffel was eighteen years old when she engaged in sexual relations with the boys, but she is twenty-five years old now. Apparently this means nothing to Dr. Phenix. And what does Dr. Phenix mean by "appropriately channel her sexuality?" She described many seeming inappropriate behaviors; promiscuity, indiscriminate relationships, risky behaviors, etc. What is still missing is a specific link to predatory acts of sexual violence. Still missing is a deviant interest in children. Whatever sexuality Dr. Phenix considers to be inappropriate may be, and certainly seems

to be, much broader than the behavior for which the United States Supreme Court will permit civil commitment. The sexually violent predator statutes do not permit secure confinement simply for inappropriate sexuality, whatever that means.

Dr. Phenix asserted that a risk factor for reoffense was Ms. Coffel's intention to return to the home of her parents until she could get settled on her own (Tr. 370-371). This "factor" has been saved for last because it is the most absurd assertion the doctor made, and demonstrates her bias in favor of Ms. Coffel's commitment. From the way Ms. Coffel spoke about her parents, Dr. Phenix diagnosed her parents with borderline personality disorder (Tr. 370-371). Since a characteristic of BPD is a lack of interpersonal skills, Dr. Phenix asserted that Ms. Coffel's parents would be unable to help her with her own problems (Tr. 372). And, thus, living in an unhelpful environment would increase Ms. Coffel's risk of engaging in predatory acts of sexual violence (Tr. 370-372). This is almost beyond belief. It can hardly be imagined that a professional psychologist would diagnose a mental condition and apply characteristics of a disease to persons he or she has never met, based purely on the description by a third person. But Dr. Phenix was willing to do so in order to commitment Ms. Coffel as a sexually

violent predator. Dr. Phenix's testimony was goal-directed toward Ms. Coffel's commitment, and completely lacked any professional objectivity.

The lack of probative value of these assertions is the product of the manner by which Dr. Phenix came to make them. Because there are no known risk factors for female sexual reoffense, Dr. Phenix used "clinical judgment" for what might suggest that Ms. Coffel is more likely than not to reoffend (Tr. 389). But clinical judgment is notoriously unreliable. Clinical judgments are not as accurate as empirical data about recidivism (Tr. 390). Dr. Phenix admitted that another problem with clinical judgment for risk assessments is that clinicians overestimate the risk of reoffense (Tr. 390). Studies with male offenders show that clinical judgments are no better than chance (Tr. 390). These inaccuracies and over-prediction are why the actuarials that are used for male sex offenders were developed (Tr. 390-391). Studies show that an evaluator's ability and accuracy in predicting risk of reoffense goes up with actuarials (Tr. 389-390). And in Ms. Coffel's case, Dr. Phenix admitted, "So I think it is premature to make a judgment of how accurate we are with females." (Tr. 390).

So, Dr. Phenix's assertion that Ms. Coffel is more likely than not to engage in predatory acts of sexual violence is drawn from an analysis the doctor admits is inaccurate and over-predicts the actual risk of reoffense. Dr. Phenix's assertion

is no more reliable than chance. Her testimony presents a classic example of the shortcomings of her methodology. The "factors" she relied upon establish only generalities, but Dr. Phenix extrapolated specific conclusions from them without knowing whether or not the "factors" even relate to sexual reoffense by women. It also appears that Dr. Phenix fell into the trap of over-predicting Ms. Coffel's risk to reoffend. She told the State in redirect examination that her conclusion "cannot wait" for empirical data on female sex offender recidivism (Tr. 391). She therefore asserted her position realizing and acknowledging "the limitation and drawbacks in predictions" made by clinical judgment (Tr. 391).

Why could Dr. Phenix not wait? Because Ms. Coffel was about to be released from confinement. And Ms. Coffel is a convicted child-sex offender with a personality disorder who has engaged in indiscriminate, promiscuous sex, and is HIV positive. Dr. Phenix would not wait because Ms. Coffel was near release and the possibility that an HIV positive woman would have unprotected sex was the real risk the doctor would not accept. The State has committed Ms. Coffel for the same reason. But Ms. Coffel cannot be committed simply because she presents a possible risk to society. The State must prove the specific risk set out by the statutes, and that Ms. Coffel is more likely than not to engage in that specific behavior beyond a reasonable doubt. The State's evidence fails to go that

far. It has done nothing more than describe Ms. Coffel as a worrisome, scary, possibly dangerous person in general. No one really knows what Ms. Coffel might do if she is released, but the State is afraid that she might do something bad. This is a risk the State is unwilling to take, so it has moved Ms. Coffel from one secure confinement to another. But it has done so without sufficient proof to justify the confinement.

The judgment is against the weight of the evidence.

Certainly, Ms. Davin and Dr. Phenix asserted that Ms. Coffel is more likely than not to engage in predatory acts of sexual violence. But the probate court could not simply rely on these mere assertions to commit Ms. Coffel to secure confinement in the Department of Mental Health. As described above, the remainder of the doctors' testimonies demonstrate how insubstantial the assertions really were. The rest of this evidence weighs heavily against the judgment of the probate court. The conclusions reached by the doctors were based on factors admittedly unknown to identify risk of reoffense, related only to general criminal recidivism rather than sexually violent or predatory offenses, and were based on methodologies admitted to be inaccurate and to over-predict recidivism, and for which their accuracy is impossible to determine. The probate

court had to ignore all of this evidence to enter the judgment it did based only on mere assertions. The judgment was against the weight of the evidence that came out through Ms. Davin and Dr. Phenix.

The judgment was also against the weight of the evidence provided by four other expert witnesses.

Dr. Dean testified that Ms. Coffel did not have a mental abnormality predisposing her to predatory acts of sexual violence, and did not fit the statutory definition of a sexually violent predator (Tr. 234, 260-261, 262). She acknowledged that antisocial personality disorder may have some effect on sexual misconduct, but she noted that the effect is shown mostly in male rapists (Tr. 272). By itself, APD does not cause a person to commit sex crimes (Tr. 273). Most persons with APD are not sex offenders (Tr. 273). Dr. Dean said there must be some sexual issue present to be exacerbated by the APD (Tr. 273). Ms. Coffel has no paraphelia (Tr. 275). Dr. Dean considered Ms. Coffel's contacts with the boys to be essentially peer relationships (Tr. 259, 300). The doctor believed that Ms. Coffel had no interest in children (Tr. 300).

Dr. Dean determined Ms. Coffel's risk of reoffense to be very low using an empirical test, the Personality Assessment Inventory (Tr. 239). This test allowed the doctor to focus on the typical characteristics of APD (Tr. 250). Ms. Coffel

scored low on two factors of APD; egocentricity and stimulus seeking (Tr. 252-253). These results indicated that Ms. Coffel is not self-centered and does not engage in thrill-seeking behavior (Tr. 253). Ms. Coffel is not driven by the types of motivators that cause someone to consistently violate the rights of others (Tr. 253). The PAI scored for warmth and dominance indicated that Ms. Coffel does not try to take advantage of others, but tries to get close to them (Tr. 253-255). Dr. Dean described Ms. Coffel as a young woman, immature for her age, who has "grown up" since going to prison and into hospital settings (Tr. 258).

Dr. Scott, a psychologist with the Missouri Department of Mental Health with specific training in examinations pursuant to the SVP law, noted that Ms. Coffel demonstrated characteristics of antisocial personality disorder, but he believed that her mental status was best described by borderline personality disorder (Tr. 460, 466). He came to this belief by focusing on the behavior manifesting the disease (Tr. 462). Ms. Coffel showed no pattern of sexually violent or predatory behavior (Tr. 462). Her behavior of using sex to gain affection, attention, and acceptance manifested a borderline personality, not an antisocial personality (Tr. 466).

Dr. Scott also acknowledged that APD generally makes a person more likely to offend or reoffend (Tr. 496). But he, too, noted that the disorder is most

strongly associated with general reoffending, not sexual reoffending (Tr. 508). Dr. Scott testified that Ms. Coffel's pattern of promiscuous behavior resulting from BPD is not predatory behavior in a clinical sense or as defined by statute (Tr. 469). He, too, saw peer relationships in Ms. Coffel's contacts with the boys before she was sent to prison (Tr. 470, 521-522). Dr. Scott discounted Ms. Coffel's immaturity as leading her to currently view boys of that age as peers since she is now twenty-five years old rather than eighteen (Tr. 471).

Dr. Scott testified that in the two studies of reoffending by female sex offenders of which he was aware, no women reoffended in one study and two reoffended in the other (Tr. 474). Those two studies involved a total of 160 to 170 female sex offenders (Tr. 474). Dr. Scott reiterated that knowledge developed regarding male sex offenders cannot be applied to Ms. Coffel because men and women have sex for different reasons and offend for different reasons (Tr. 476). He advised the probate court that, "if nothing else is clear," it is well-known that knowledge regarding male sex offenders cannot be applied to female sex offenders (Tr. 474). What is known from research involving female sex offenders is that reoffense is very infrequent (Tr. 475).

Dr. Maskel is trained in sexually violent predator evaluations and in diagnosing and treating borderline personality disorder (Tr. 407-408). She told

the probate court that Ms. Coffel's BPD was not a mental abnormality because it does not predispose her to acts of sexual violence (Tr. 410). Dr. Maskel agreed that some of Ms. Coffel's behavior could be described as sexually violent, but much if it cannot be described in that manner (Tr. 413). Consensual sex with adults and promiscuous sex are neither sexually violent nor predatory (Tr. 413). Dr. Maskel also considered Ms. Coffel's behaviors with the boys to be peer relationships resulting from her immaturity (Tr. 413-414). While Ms. Coffel remains emotionally immature, she is now twenty-five years old rather than eighteen and Dr. Maskel saw nothing to suggest that Ms. Coffel would be drawn to persons under the age of eighteen (Tr. 415, 455). Ms. Coffel has never been diagnosed with a paraphelia or a sexual interest in children (Tr. 415). Dr. Maskel also believed that Ms. Coffel's behaviors resulted from the need for attachments caused by borderline personality, not simply to engage in antisocial acts (Tr. 418-419).

Like the others, Dr. Maskel told the probate court that knowledge regarding male sex offenders could not be applied to female sex offenders. She noted that in comparison to female sex offenders, "[t]here's a whole pile of research of male sex offenders." (Tr. 449). Because of this extensive research, it is possible to identify risk factors for recidivism in men (Tr. 449). But it is

impossible to take risk factors from one population and apply them to another unless the characteristics of the second population are similar to the first (Tr. 449-450).

Dr. Maskel testified that the "factors" relied upon by Dr. Phenix were simply the factors used to diagnose BPD, and added nothing new to an assessment of risk (Tr. 424). She told the probate court, "We don't know that [Ms. Coffel] being a borderline personality disorder individual makes her riskier of going out after a period of incarceration, and offending again in a very specific manner, which is a sexually violent manner." (Tr. 424). According to Dr. Maskel, "We don't know that clinically and we don't know that empirically." (Tr. 425).

Dr. Colebank runs the Kentucky sex offender treatment program which includes female offenders, and conducted research with another doctor to search for risk factors for reoffense by female sex offenders (Tr. 195-196, 199). They researched the largest group of female sex offenders ever studied (Tr. 206). And yet, they could not identify the variables related to the risk of reoffense (Tr. 198). This is probably because of the 97 female offenders, going back to 1985, *not one* committed a new sex offense (Tr. 207).

The commitment is not supported by proof beyond a reasonable doubt.

The State does not know what factors legitimately relate to Ms. Coffel's risk of engaging in predatory acts of sexual violence. The State does not know if the factors relied upon by its witnesses accurately assess Ms. Coffel's risk to engage in predatory acts of sexual violence. The State's witnessed admittedly relied upon a methodology that is unreliable and over-estimates the risk of reoffense. The State has utterly failed to establish *by proof beyond a reasonable doubt* that Ms. Coffel is, in fact, more likely than not to engage in predatory acts of sexual violence unless confined in a secure facility. But the State is fearful of Ms. Coffel's general behavior and is therefore currently confining her in a secure DMH facility within the razor-wire fence of a state penitentiary. This wrong must be remedied.

Other cases.

Ms. Coffel has found three other cases involving commitment of women as sexually violent predators, all in the State of Ohio. Ohio defines a sexually violent predator as "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." ***State v. Thomas***, 1998 WL 401838 (Ohio App. 2 Dist.), page 1. The Ohio statutes also specify a non-exclusive list of

factors to be considered by the court. ***Id***. The standard of proof in Ohio is clear and convincing evidence. ***Id***. page 3. The Ohio appellate courts apply this standard on review to affirm a judgment if there is "some competent credible evidence" to support it. ***State v. Hardie***, 749 N.E.2d 792, 794 (Ohio App. 4 Dist., 2001).

Comparisons with the Ohio commitments demonstrate that the state presented evidence in those cases beyond what Missouri presented against Ms. Coffel. In ***Thomas***, ***supra***., the nineteen year old respondent molested a four year old and a five year old child. ***Id***. page 1. The state's expert said molesting very young children presented a higher risk of reoffense. ***Id***. page 2. The respondent committed the offenses while she was baby-sitting them. ***Id***. She allowed the children to watch pornographic tapes on many occasions. ***Id***. The Court described this as a "demonstrated pattern of abuse." ***Id***.

The nineteen year old respondent in ***State v. Pavlick***, 2000 WL 1442 (Ohio App. 5 Dist.), engaged in sexual contact and sexual intercourse with five boys ranging in age from thirteen to fifteen. ***Id***. page 1. The court found that repeated sexual intercourse with the boys from the neighborhood was a demonstrated pattern of abuse. ***Id***. page 5. A pre-sentence investigation report indicated that the respondent suffered antisocial personality disorder with borderline features

and her prognosis for recovery from being a sexual predator was "guarded no matter what the intervention period." ***Id***.

The respondent in ***Hardie*** committed multiple offenses against multiple victims and only stopped when she was caught. 749 N.E.2d at 793. She provided alcohol to the victims. ***Id***. She placed the blame on her relationship with her husband which caused her low self-esteem. ***Id***. She minimized the wrongfulness of her acts by suggesting that her victims were "experienced." ***Id***.

Obvious distinctions appear between the Ohio commitments and Ms. Coffel's commitment. Ohio requires only evidence that the person is "likely" to reoffend, not evidence that the person is "more likely than not" to reoffend. Ohio's is the lower standard. Ohio's standard of proof is clear and convincing evidence, a lower standard than Missouri's proof beyond a reasonable doubt. The Ohio standard of review is whether "some competent credible evidence" supports the judgment. Missouri has a higher standard of appellate review, whether the judgment is supported by substantial evidence or is against the weight of the evidence.

Appropriate relief.

Because the State failed to present sufficient evidence to prove beyond a reasonable doubt that Ms. Coffel has a mental abnormality making her more likely than not to engage in predatory acts of sexual violence unless she is confined in a secure facility, the judgment of the probate court must be reversed and Ms. Coffel must be released from confinement.

IV.

The trial court erred when it denied Ms. Coffel's motion to dismiss the state's petition because the SVP statute violates the Equal Protection Clauses of Article I, Section 2 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Equal Protection requires that similarly situated persons be treated similarly. If a person is involuntarily committed to DMH for reasons other than a SVP finding, the DMH must place him in the least restrictive environment. The SVP statute has no such requirement – any person found to be a SVP is automatically committed to the custody of the DMH and placed in a secure facility with no regard for whether that person can be placed in a less restrictive environment. There is no rational basis for the disparate treatment of the two classes of persons. Ms. Coffel was prejudiced by the trial court's error because there was no evidence of or consideration given to placing her in the least restrictive environment. Thus, Ms. Coffel was deprived of her liberty pursuant to a statute that, on its face and as applied, violates the Equal Protection Clauses.

Ms. Coffel filed a motion to dismiss the petition because Section 632.495, RSMo 2000, fails to allow for confinement of a person involuntarily committed

under the statute in an environment less restrictive than a secure facility (L.F. 32, 40-42). She argued that the statute deprived her of equal protection of the law because other persons involuntarily committed pursuant to Chapter 632 must be confined in the least restrictive environment appropriate for their treatment and control (L.F. 40-42).

Section 632.495 provides that a person determined to be a sexually violent predator is committed to the custody of the Department of Mental Health for control, care and treatment. That section further demands: "At all times, persons committed for control, care and treatment by the department of mental health pursuant to sections 632.480 to 632.513 shall be kept in a secure facility designated by the director of the department of mental health and such persons shall be segregated at all times from any other patient under the supervision of the director of the department of mental health." ***Id***.

Chapter 632 sets out Missouri's Comprehensive Psychiatric Services. Persons other than those defined as "sexually violent predators" can be involuntarily civilly committed under that chapter if "as a result of a mental disorder, [the person] presents a likelihood of serious harm to himself or others." Section 632.300, RSMo 2000. If a person is found to present a likelihood of serious harm to himself or others as the result of a mental illness, the person is

"detained for involuntary treatment in the least restrictive environment for a period not to exceed one year or for outpatient detention and treatment under the supervision of a mental health program in the least restrictive environment for a period not to exceed one hundred eighty days." Section 632.355, RSMo 2000. It is further required by Chapter 632: "Notwithstanding any other provision of the law to the contrary, whenever a court orders a person detained for involuntary treatment in a mental health program operated by the department, the order of detention shall be to the custody of the director of the department, who shall determine where detention and involuntary treatment shall take place in the least restrictive environment, be it an inpatient or outpatient setting." Section 632.365, RSMo 2000. Indeed, the Missouri legislature has granted certain entitlements to persons in the custody of the Department of Mental Health, among them the right "[t]o be evaluated, treated or habilitated in the least restrictive environment." Section 630.115(11), RSMo 2000.

Although not specifically raised in Ms. Coffel's motion, it is instructive to review the treatment under Chapter 552 of persons found not guilty of a crime by reason of a mental disease or defect. When a criminal defendant is tried and acquitted on the basis of a mental disease or defect excluding responsibility, the defendant is ordered into the custody of the director of the Department of Mental

Health. Section 552.040.2, RSMo 2000. Except for persons charged with dangerous felonies as defined by Section 556.061, murder in the first degree, or sexual assault, the defendant may be permitted immediate conditional release from custody of the director. ***Id.*** In all circumstances, any person found not guilty by reason of a mental disease or defect can ultimately be considered for care, control and treatment outside of a secure facility:

> Notwithstanding section 630.115, RSMo any person committed pursuant to subsection 2 of this section shall be kept in a secure facility until such time as a court of competent jurisdiction enters an order granting a conditional or unconditional release to a nonsecure facility.

Section 552.040.4.

All of these statutes deal with persons committed to the Department of Mental Health due to a mental condition. Persons with a mental disorder rendering them dangerous to themselves or others and criminal defendants found not guilty due to a mental disease or defect excluding responsibility are permitted by statute to be confined, cared for, and treated in the least restrictive environment appropriate. But to the contrary, persons with a mental abnormality "affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such

person a menace to the health and safety of others," Section 632.480(2), can only be confined, cared for, and treated in a secure facility. No less restrictive alternative is permitted by Section 632.495.

In deciding whether a statute violates equal protection, this Court must decide whether the classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. ***Etling v. Westport Heating and Cooling Services, Inc.***, 92 S.W.3d 771, 774-775 (Mo. banc 2003). If so, the classification is subject to strict scrutiny and the Court must determine whether it is necessary to accomplish a compelling state interest. ***Id***. If not, review is limited to whether the classification is rationally related to a legitimate state interest. ***Id***.

Equal protection does not require that all persons be dealt with identically, but does require that a distinction made has some relevance to the purpose for which the classification is made. ***Baxstrom v. Herold***, 86 S.Ct. 760, 763 (1966). And certainly, a legislature is free to recognize degrees of harm and may confine its restrictions to those classes where the need is deemed the clearest. ***State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County***, 60 S.Ct. 523, 526 (1940). But, "[e]qual protection of the law means equal security or burden under the laws to every one similarly situated; and that no person or

class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place or under like circumstances." ***Ex parte Wilson***, 48 S.W.2d 919, 921 (Mo. banc 1932). The statute in ***Pearson*** distinguished for special treatment those persons who by habitual course of misconduct in sexual matters had evidenced an utter lack of power to control their sexual impulses from all persons guilty of sexual misconduct or having strong sexual tendencies. ***Id***. 525-526. Ms. Coffel has been denied equal protection because she is treated differently under Section 632.495 from other persons rendered dangerous to others by a mental disorder; persons or a class of persons in the same place and under like circumstances as he.

The Supreme Court of the State of Washington found an equal protection violation in the failure of that state's SVP statute to provide care and treatment in the least restrictive environment appropriate, a requirement of its general civil commitment law. ***In re Young***, 857 P.2d 989 (Wash. 1993). The Washington statutes were very similar to those in Missouri. Washington defined an SVP as a person "who has been convicted of or charged with a crime of sexual violence and who suffers a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." ***Id***. at 993. A mental abnormality is defined as "a congenital or acquired condition affecting

the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts." ***Id***. A person found to be an SVP under the Washington statutes is committed to a facility for control, care and treatment until the person is safe to be at large, and limits the treatment centers to which a person is committed to mental health facilities located within correctional institutions. ***Id***.

This limitation was inconsistent with the Washington statutes controlling general involuntary civil commitments which required consideration of less restrictive alternatives as a precursor to confinement. 857 P.2d at 1012. The Washington Supreme Court held, "The State cannot provide different procedural protections for those confined under the sex predator statute unless there is a valid reason for doing so." ***Id***. The Court found no justification for considering less restrictive alternatives under the general commitment statutes, but not considering them under the SVP commitment statutes. ***Id***. The Washington Supreme Court explained the basis for its judgment:

> Not all sex predators present the same level of danger, nor do they require identical treatment conditions. Similar to those committed under RCW 71.05 [the general civil commitment statute], it is necessary to account for these differences by considering alternatives to total

confinement. We therefore hold that equal protection requires the State to comply with the provisions of RCW 71.05 as related to the consideration of less restrictive alternatives.

Id.

By the same token, equal protection requires application of Section 632.365, "[n]otwithstanding any other provision of the law to the contrary, whenever a court orders a person detained for involuntary treatment in a mental health program operated by the department [of mental health], the order of detention shall be to the custody of the director of the department, who shall determine where detention and involuntary treatment shall take place in the least restrictive environment, be it an inpatient or outpatient setting," and Section 630.115, "[e]ach patient, resident or client shall be entitled to the following without limitation: [t]o be evaluated, treated or habilitated in the least restrictive environment," to persons committed under Section 632.495.

The State will in all likelihood suggest that the Missouri statutes differ from the Washington statutes in a way sufficient to distinguish the result in ***Young*** and thus survive an equal protection challenge. This suggestion would be wrong.

The State may suggest that the Missouri legislature has exercised its authority under ***State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County***, ***supra***., to recognize degrees of harm and confine its restrictions to those classes where the need is deemed the clearest. Missouri defined a "sexually violent predator" as any person who suffers a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence *if not confined in a secure facility*. Section 632.480(5). The State may suggest that this emphasized qualifier is the legislature's recognition of a special degree of harm justifying different treatment. This language was not contained in the statute considered by the Washington Supreme Court in ***Young***.

But the Washington legislature added that exact language to its statute in response to the decision in ***Young***. *See* ***Detention of Ross***, 6 P.3d 625, 628 (Wash. App., 2000). The respondent in ***Ross*** was not allowed to present evidence that care, control and treatment could be provided to him in a less restrictive alternative to secure confinement. ***Id***. The State argued on appeal that the new language of the statute, "if not confined in a secure facility" precluded admission of that evidence. ***Id***. at 629. The Washington appellate court disagreed. Because the State was required to establish that the respondent was more likely than not

to reoffend if not confined in a secure facility, he was entitled to present evidence to rebut the necessity of secure confinement. ***Id***.

The Washington legislature again responded by amending the statute to allow a person committed as a sexually violent predator to present evidence of a less restrictive alternative only at an annual release hearing following commitment, but not at trial. ***Detention of Brooks***, 36 P.3d 1034, 1040 (Wash. 2001). The Washington Supreme Court re-affirmed its holding in ***Young*** that "persons confined under chapter 71.05 RCW and chapter 71.09 RCW are similarly situated with respect to the legitimate purposes of the laws." ***Id***. at 1042. The Court accepted the State's argument that there were good reasons for treating SVPs differently from mentally ill persons because SVPs are generally more dangerous. ***Id***. But the Court also found that there was no rational basis to permit SVPs to present evidence of less restrictive alternatives only at annual reviews, and not at trial for the jurors' consideration of whether the person was even an SVP at all. ***Id***. at 1043-1044. The Washington Supreme Court held, "As we did in *Young* when we found an equal protection violation, we remand [the] cases for new commitment trials at which LRAs to confinement may be considered." ***Id***. at 1044.

There is no rational basis for the Missouri statutes to permit less restrictive alternatives to persons involuntarily committed on the basis of "a mental disorder [that] presents a likelihood of serious harm to himself or others," but denies that consideration to persons with a mental abnormality "constituting … a menace to the health and safety of others." The failure of Section 632.495 to permit consideration of less restrictive alternatives to secure confinement violates equal protection of the laws. The statute is unconstitutional, and the probate court erred in failing to dismiss the petition filed against Ms. Coffel. The judgment must be reversed and Ms. Coffel released from confinement.

CONCLUSION

Because the State failed to prove, and the probate court failed to find that any existing mental abnormality caused Ms. Coffel "serious difficulty" controlling her behavior, as set out in Point I, the judgment of the probate court must be reversed and the cause remanded for a new trial. Because the State failed to prove that sexual sadism and alcohol abuse were mental abnormalities that will make Ms. Coffel more likely than not to commit predatory acts of sexual violence if not in a secure facility, as set out in Point II, the judgment of the probate court must be reversed and Ms. Coffel must be released from confinement. Because the State failed to present sufficient evidence to prove beyond a reasonable doubt that Ms. Coffel has a mental abnormality making her more likely than not to engage in predatory acts of sexual violence unless she is confined in a secure facility, as set out in Point III, the judgment of the probate court must be reversed and Ms. Coffel released from confinement. Because Section 632.495 fails to permit consideration of less restrictive alternatives to secure confinement and violates equal protection of the laws, as set out in Point IV, the probate court erred in failing to dismiss the petition filed against Ms. Coffel and the judgment must be reversed and Ms. Coffel released from confinement.

Respectfully submitted,

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Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 20,174 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in July, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ___ day of September, 2003, to Theodore Bruce, State Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Emmett D. Queener

APPENDIX

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